Supreme Court, U.S.
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CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-___

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

Petitioner was sentenced to death by a Tennessee jury. On federal habeas, the district court found that petitioner had been grossly prejudiced by his counsel's failure to introduce any mitigating evidence at sentencing. The court found that petitioner's counsel should have introduced compelling evidence regarding (i) the vicious abuse petitioner suffered as a child, (ii) petitioner's seriously dysfunctional upbringing as a result of his family's history of mental illness, (iii) petitioner's own substantial mental illness, (iv) petitioner's contributions to society and his good character, and (v) the circumstances of the homicide. The court further found that counsel should have introduced important mitigating evidence regarding the principal aggravating circumstance supporting the death penalty. The available evidence, the district court found, called petitioner's death sentence into question because it would have affected at least one juror's determination to impose the death penalty. The court accordingly vacated petitioner's death sentence and remanded for resentencing.

A divided panel of the Sixth Circuit rejected the state's only argument on appeal – that the district court lacked authority to expand the factual record on the question of prejudice. The panel majority also rejected petitioner's protective cross-appeal that the instructions used at his sentencing were unconstitutional, bizarrely reasoning that petitioner would have been sentenced to death even if those instructions had not been utilized because petitioner's constitutionally ineffective trial counsel had failed to put any mitigating evidence before the jurors.

Although the panel had thereby resolved the parties' arguments, two judges proceeded, *sua sponte* and with only *two sentences* of explanation, to reinstate petitioner's death sentence on the ground that the district court record did not establish prejudice. Petitioner's counsel had not presented argument on that question to the Sixth Circuit because the state did not appeal on that ground and the panel did not even mention it at oral argument.

The panel majority admitted that "much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling." But it noted that "aspects" of some of the mitigating evidence "also contained harmful information." The majority then opined on that basis that "the sentencing jury" would not have "concluded that the balance of aggravating and mitigating factors did not warrant death."

The panel majority did not discuss *any* of the classes of mitigating evidence found by the district court. Nor did it consider whether the evidence would have affected the jury's sense of petitioner's moral culpability.

The Questions Presented are:

1. Whether the panel majority erred in *sua sponte* reviewing the district court's finding that the evidence developed in federal court demonstrated prejudice because:

   (a) in conflict with the Seventh, Ninth, and Tenth Circuits, it departed from the principle that, on federal habeas, both petitioners and states are deemed to waive arguments not raised on appeal; and

   (b) in conflict with *Lankford* v. *Idaho*, 500 U.S. 110 (1991), it provided petitioner no notice or opportunity to be heard and thereby violated petitioner's right not to be deprived of his life without due process of law and his right to be free from cruel and unusual punishment.

2. Whether the panel majority's prejudice analysis was erroneous, including because:

   (a) in conflict with *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000), and decisions of other circuits to the same effect, it departed from the principle that prejudice exists when there is a reasonable probability that mitigation evidence would have affected the jury's sense of the defendant's "moral culpability," "even if it [would] not undermine or rebut the prosecution's death-eligibility case";

   (b) in conflict with *Williams*, 529 U.S. at 396-97, and decisions of other circuits to the same effect, it departed from the principles that (i) a reviewing court must con-

sider the "totality" of the available mitigating evidence, and (ii) the presence of unfavorable aspects to that evidence does not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [the defendant's] favor";

(c) it accorded undue weight to the aggravating circumstances found by the jury, particularly given that one aggravating circumstance rested on a jury instruction that was unconstitutional under settled Sixth Circuit law;

(d) in conflict with *Williams*, 529 U.S. at 398, and decisions of other circuits to the same effect, it departed from the principle that supposedly negative evidence is properly regarded as mitigating to the extent that it demonstrates that "violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation";

(e) in conflict with numerous circuits, it failed to accord special weight to the fact that only a single juror had to conclude that a life sentence was appropriate (an issue this Court granted certiorari to decide in *Williams*, but ultimately did not reach); and

(f) in conflict with numerous circuits, it failed to accord special weight to the fact that petitioner's counsel introduced no mitigation evidence at all (such that imposition of the death penalty became essentially automatic).

3. Whether, as held by the Third and Seventh Circuits, jury instructions and verdict forms such as those used at petitioner's sentencing and upheld by the Sixth Circuit here unconstitutionally suggest that a single juror cannot find a particular mitigating circumstance or hold out for a life sentence.

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court's opinion and final judgment granting petitioner a writ of habeas corpus and vacating his death sentence (Pet. App. 47a-98a) are published at 999 F. Supp. 1073. The district court's three prior opinions disposing of preliminary motions (Pet. App. 99a-131a, 132a-136a, 137a-155a) are unpublished. The court of appeals' divided opinion reversing the district court (Pet. App. 1a-46a (per Siler, J., joined by Batchelder, J.; Cole, J., concurring in part and dissenting in part)) is published at 226 F.3d 696. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 156a) is unpublished.

RELEVANT CONSTITUTIONAL PROVISIONS

The relevant portions of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are reproduced in the appendix (Pet. App. 166a).

JURISDICTION

The court of appeals entered its opinion on September 13, 2000, and denied petitioner's timely petition for rehearing with a suggestion of rehearing en banc on December 22, 2000. Justice Stevens subsequently extended the time to file this petition to and including May 21, 2001. Applic. No. 00A778. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner Abu-Ali Abdur'Rahman (previously known as James Lee Jones) was convicted of murder and sentenced to death by a Tennessee jury in 1987.[1] According to the state courts, petitioner and a co-defendant planned to rob a drug dealer but, after initially entering the dealer's residence and binding him with duct tape, petitioner stabbed him to death and also stabbed another person, who survived. In his defense, petitioner argued that the crime was committed in furtherance of a

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[1] This version of events, although contested by petitioner below, is taken from the state post-conviction courts' opinions.

plan by the Southeastern Gospel Ministry ("SEGM"), a radical African-American group with which he was associated, to rid the community of drug dealers.[2]

Although the state failed to preserve the verdict form, the Tennessee courts believed that the jury imposed the death penalty after finding three aggravating circumstances: (1) the murder was especially "heinous, atrocious, or cruel"; (2) petitioner had been convicted of two prior violent felonies; and (3) petitioner committed the murder in the course of a robbery. Given that petitioner's counsel conducted *no* investigation into mitigating circumstances and introduced *no* mitigating evidence, the jury, unsurprisingly, sentenced petitioner to death.

2. The state post-conviction courts compiled an extensive record of thirteen instances in which petitioner's trial counsel had rendered ineffective assistance, see Pet. App. 79a-81a, but held that petitioner was not prejudiced at sentencing. They characterized the mitigating evidence presented to them as suggesting that petitioner had a history of violent and anti-social behavior. That evidence, the state courts believed, was "both helpful and harmful" to petitioner. *Id.* 17a.

3. Finding ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the federal district court subsequently compiled a much more extensive factual record and granted petitioner a writ of habeas corpus, vacating his death sentence and remanding for resentencing.[3] The district court received more than 150 exhibits and took testimony from twenty witnesses, including family members, petitioner's former fiancée, petitioner's former employer, mental health professionals, and a forensic pathologist.

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[2] An individual associated with SEGM paid petitioner's counsel a $5,000 retainer and promised to pay an additional $10,000. Petitioner's counsel determined not to prepare for the case until that further fee was paid, but it never was, a fact that no doubt contributed significantly to the ineffective representation petitioner received. Pet. App. 74a.

[3] The petition for habeas corpus was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, and accordingly is not subject to that statute. See Pet. App. 16a.

Based on this evidence, the district court made extensive findings that petitioner had been grossly prejudiced by his counsel's failure to develop and introduce evidence regarding five different classes of mitigating evidence, as well as the mitigating circumstances surrounding the prior homicide invoked by the prosecution as the principal aggravator supporting the death penalty. Recognizing that only a unanimous jury can impose a death sentence, the district court found prejudice because, at the very least, one of the jurors would have found the "abundant" mitigating evidence sufficiently persuasive to impose a life sentence. Among other things, the district court relied on this Court's conclusion that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable.'" Pet. App. 87a (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)).

The mitigation evidence in this case, the district court found, would have presented a very different and compelling picture of a person whose life merited saving. Pet. App. 96a. Indeed, it variously found the available mitigation evidence to be "abundan[t]," "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming"; it found counsel's failures to put that evidence before the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous." See generally Pet. App. 83a-96a.

The district court specifically found that jurors had been deprived of any evidence of (i) the vicious abuse petitioner suffered as a child, (ii) petitioner's exceedingly dysfunctional upbringing as a result of his family's history of mental illness, (iii) petitioner's own substantial mental illness, (iv) petitioner's good character and contributions to society, and (v) the mitigating circumstances of the crime itself, as well as evidence regarding the mitigating circumstance of the homicide that was the principal aggravator invoked by the state. See Pet. App. 83a-96a.

The district court separately addressed the limited mitigation proof that had potentially "negative" elements, explaining (Pet. App. 96a):

> Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other

> evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

The district court took care to emphasize that "[t]his is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence—none—being offered to the jury despite its availability and abundance." Pet. App. 96a. The court found it inescapable that petitioner's counsel "utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death. This is *not* a case of harmless error." *Id.* 97a (emphasis added).

4. The Sixth Circuit subsequently rejected the state's only argument on appeal, but two members of the court *sua sponte* reinstated the order of execution.

The state's only theory on appeal was that the district court lacked the authority to expand the factual record on petitioner's claim of sentencing prejudice.[4] Two members of the panel – Judges Siler and Cole – rejected that argument, finding that the district court had inherent discretion to conduct the hearing. Pet. App. 12a-16a, 38a-39a.

A different majority – Judges Siler and Batchelder – rejected petitioner's protective cross-appeal. Petitioner first challenged the use of a "heinous, atrocious, or cruel" ("HAC") aggravating circumstance instruction, which previous decisions of the Sixth

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[4] Respondent thus did not dispute either that petitioner's counsel had been ineffective or that the federal court record demonstrated that petitioner had been prejudiced and unconstitutionally sentenced to death as a result.

Circuit had held to be unconstitutionally vague when (as in this case) the jury did not make any finding that would narrow the aggravator's application. See *Coe* v. *Bell*, 161 F.3d 320 (CA6 1998) (sustaining HAC aggravator only because jury made specific finding that killing involved torture), *cert. denied*, 528 U.S. 842 (1999); *Houston* v. *Dutton*, 50 F.3d 381 (CA6) (invalidating HAC aggravator), *cert. denied*, 516 U.S. 905 (1995). The panel majority held that the error was harmless in this case, however, because petitioner's trial counsel had failed to introduce any mitigating evidence that could outweigh the two other aggravating circumstances that had been found by the jury. Pet. App. 24a. "[I]n the instant case, as the district court found, '[t]his is a case of no mitigating evidence—none—being offered to the jury despite its availability and abundance.'" *Id.* (second alteration in original). The majority explicitly refused to consider any of the mitigation evidence found by the district court; asserting (erroneously) that petitioner's brief on appeal made no such argument. *Id.* 24a n.6.

The same two judges rejected petitioner's argument that, in violation of *Mills* v. *Maryland*, 486 U.S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U.S. 433 (1990), the sentencing instructions had unconstitutionally suggested that the jurors must be unanimous in their determination of mitigating circumstances. The court concluded that the instructions could not be said "to require unanimity as to the presence of a mitigating factor." Pet. App. 26a. Furthermore, any risk that the instructions "could have led the jury to misinterpret their obligation" to consider mitigating evidence individually was "not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence." *Id.* The majority again relied on the fact that "there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor." *Id.* 27a n.7.

The panel had thus resolved the issues raised by the parties. Acting *sua sponte*, however, Judges Siler and Batchelder proceeded to reverse the district court's finding that the expanded record established prejudice and to reinstate petitioner's death

sentence, notwithstanding that the issue had not been appealed by the state, briefed by the parties, or even raised by any member of the panel at oral argument. Indeed, on appeal, the state had effectively *acceded* to the district court's finding that the evidence adduced at the evidentiary hearing established prejudice. *E.g.*, Resp. C.A. Br. 14; Trans. of Oral Arg. 11, 45.

The panel majority framed its prejudice inquiry as whether there was "a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death." Pet. App. 19a. The majority freely acknowledged that "the supplemental evidence contains mitigating evidence that a sentencer might find compelling." *Id.* 20a. But it opined – in only *two sentences* of analysis – that "the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits." *Id.* On this basis, and this basis alone, the majority reinstated petitioner's order of execution.

5. Judge Cole dissented, detailing the extensive mitigating evidence that petitioner's counsel should have introduced – *none* of which the majority even *acknowledged*. As he explained, the majority ignored "the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or harmful behavior by Abdur'Rahman." Pet. App. 45a. Because the jury received none of this evidence, "it had nothing to weigh * * * against" the aggravating circumstances of the case. *Id.* "The jury's failure to consider mitigating evidence," Judge Cole explained, "'"risks erroneous imposition of the death sentence."'" *Id.* (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 442 (1990) (quoting, in turn, *Eddings* v. *Oklahoma*, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring))).

Judge Cole also rejected the majority's view that petitioner was not prejudiced because some of the available mitigation evidence was also "harmful." In reality, the evidence would have demonstrated significant mitigating circumstances regarding the principal aggravating felony supporting the death sen-

tence. Pet. App. 41a. The majority's contrary reasoning furthermore "contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury." *Id.* 45a. Moreover, the majority's reasoning ignored the fact that "the jury already had much of [the supposedly negative] evidence before it." *Id.* Nor would the evidence "have subjected Abdur'Rahman to additional statutory aggravating factors." *Id.* Even to the extent that the mitigating evidence did contain "harmful" information, this Court had held in *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000), which was decided after the briefing and oral argument in the Sixth Circuit, that "the presence of unfavorable records [does] not justify 'the failure to introduce the comparatively voluminous amount of evidence that did speak in [petitioner's] favor.'" *Id.* (second alteration in original).

Ultimately, Judge Cole concluded, "[t]he mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing – the very purpose of a capital sentencing hearing." Pet. App. 45a.

6. Petitioner's motion for rehearing with a suggestion of rehearing *en banc*, arguing that the panel majority erred in reaching the question of prejudice *sua sponte*, was subsequently denied. Pet. App. 156a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case involves one of the most grievous failures by counsel in a capital case ever to come before this Court. The failure of petitioner's counsel to introduce the voluminous, compelling mitigating evidence available in this case, leaving the jurors with no reason to believe that petitioner's life was worth saving, obviously prejudiced petitioner within the meaning of *Strickland*. In *sua sponte* reversing the district court's order remanding for resentencing, the Sixth Circuit has flouted this Court's decisions and has set itself at odds with a majority of its sister circuits.

Certiorari is warranted in this case on three independent bases. *First*, the Sixth Circuit's decision to reach the question of

prejudice *sua sponte* and to reinstate petitioner's death sentence on that basis conflicts with precedents of the Seventh, Ninth, and Tenth Circuits and this Court's decision in *Lankford* v. *Idaho*, 500 U.S. 110 (1991). *Second*, the Sixth Circuit's prejudice analysis conflicts with this Court's recent decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), and precedents of numerous circuits. *Third*, the Sixth Circuit's holding that the jury instructions and verdict form on unanimity were constitutional conflicts with precedents of the Third and Seventh Circuits.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE PANEL MAJORITY'S DECISION TO ADDRESS THE DISTRICT COURT'S PREJUDICE DETERMINATION *SUA SPONTE*.

The decision below is irreconcilable with the principle that a party is deemed to have waived all arguments not expressly raised on appeal. "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

The Sixth Circuit has recognized the waiver principle, see *McMurphy* v. *City of Flushing*, 802 F.2d 191, 198-99 (CA6 1986), and has not hesitated to invoke it *against* habeas petitioners (indeed, it has repeatedly done so when the State of Tennessee was the appellee), routinely holding that arguments raised by the petitioner in the district court but not pursued on appeal are waived.[5] In this very case, the Sixth Circuit *sua sponte* addressed the prejudice argument waived by respondent but *refused* to consider an argument that it (erroneously) believed petitioner had waived, sentencing petitioner to death as a result. See *infra* at 20-21 n.12 (discussing HAC aggravator). The only possible basis for the panel's one-sided application of the waiver

[5] *E.g.*, *Mitchell* v. *Myers*, No. 96-6214, 1998 U.S. App. LEXIS 17897, at **2-3 (CA6 July 31, 1998); *Mathis* v. *Dutton*, No. 94-5511, 1995 U.S. App. LEXIS 2922, at *2 (CA6 Feb. 10, 1995); *Gray* v. *Tennessee*, No. 94-5346, 1994 U.S. App. LEXIS 30156, at *3 (CA6 Oct. 18, 1994); *Hunt* v. *Mills*, No. 92-5695, 1993 U.S. App. LEXIS 6913, at *2 (CA6 Mar. 24, 1993).

rule is the principle adopted by the Eighth Circuit – and advanced by respondent in successfully opposing rehearing – that reviewing courts may overlook waivers by the state. See *Lufkins* v. *Leapley*, 965 F.2d 1477, 1481-82 (CA8), *cert. denied*, 506 U.S. 895 (1992).

In square conflict with the Eighth Circuit, the Seventh, Ninth, and Tenth Circuits flatly reject such a one-sided application of the waiver rule. *E.g.*, *Demarest* v. *Price*, 130 F.3d 922, 942 n.9 (CA10 1997); *Boardman* v. *Estelle*, 957 F.2d 1523, 1537 (CA9) (per curiam), *cert. denied*, 506 U.S. 904 (1992); *Rivera* v. *Director, Dep't of Corrections*, 915 F.2d 280, 283 (CA7 1990) (per Posner, J.) ("[T]he issues in habeas corpus as in other civil cases are framed by the parties, so that if the state waives its best arguments it must live with the consequences."); *Wilson* v. *O'Leary*, 895 F.2d 378, 384 (CA7 1990) (per Easterbrook, J.) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. * * * Procedural rules apply to the government as well as to defendants.").[6]

Whatever the basis for the Sixth Circuit's failure to abide by the waiver principle, adherence to that rule is constitutionally mandated in the capital context. This Court held in *Lankford* v. *Idaho*, 500 U.S. 110, 124 (1991), that the Constitution is violated when capital defendants are not provided notice and an opportunity to be heard that a court is considering whether to impose the death penalty if "inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made." The Court rested its holding on "the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure," a concern that takes on "special importance * * * in the capital sentencing context." *Id.*

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[6] Some circuits recognize an exception to the waiver principle for doctrines such as exhaustion and procedural default that (unlike this case) "substantially implicate[] important nonjurisdictional concerns [such as comity] that transcend the interests of the parties." *Hines* v. *United States*, 971 F.2d 506, 508 (CA10 1992). But compare *Boardman*, 957 F.2d at 1537.

at 121, 125. "Notice of issues to be resolved by the adversary process," the Court explained, "is a fundamental characteristic of fair procedure." *Id.* at 126. See also *id.* at 126 n.20 (discussing heightened concerns in death penalty context under Eighth Amendment's prohibition on cruel and unusual punishment).

The decision below – reinstating the death penalty without any notice that the court was considering the balance of aggravating and mitigating factors as developed in the district court – is irreconcilable with *Lankford*. Respondent framed as the issue on appeal the technical question whether, under the pre-AEDPA federal habeas statute, a district court had the inherent authority to hold an evidentiary hearing on the question of prejudice. Furthermore, at oral argument, none of the members of the panel raised the question whether prejudice existed in light of the federal court record. Accordingly, as in *Lankford*, petitioner's counsel did not address "whether the death penalty was either appropriate or permissible" in light of that evidence, and acted perfectly reasonably in that regard.

Nor is there any doubt that the majority below "frustrated counsel's opportunity" to make a potentially persuasive argument. *Lankford*, 500 U.S. at 124. As we discuss *infra*, the decision below is deeply flawed in a number of respects that could have been avoided by presentation by counsel, including the majority's failure to apply the proper test for finding prejudice or to appreciate the nature of the mitigation evidence produced in the district court. Indeed, the gravity of the Sixth Circuit's error is heightened in the context of the reviewing court's obligation to conduct a *de novo* review of the evidence supporting a finding of prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984). The panel majority *could not* have complied with that obligation, given that petitioner's counsel understandably never presented most of the mitigation evidence to the panel.

In this respect, the decision also conflicts with decisions of other circuits holding that it would be fundamentally unfair to rule against a habeas petitioner, *even in a non-capital case*, on a ground on which he has not received notice and an opportunity to be heard. See *Boyd* v. *Thompson*, 147 F.3d 1124, 1128 (CA9 1998); *Odum* v. *Boone*, 62 F.3d 327, 330 (CA10 1995); *Esslin-*

ger v. *Davis*, 44 F.3d 1515, 1528 & n.45 (CA11 1995); *Lugo* v. *Keane*, 15 F.3d 29, 30 (CA2 1994) (per curiam).

Because there is no question that, in several circuits, the court would not have reached the question of prejudice and petitioner would not now be sentenced to death, certiorari accordingly should be granted.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE SIXTH CIRCUIT'S DETERMINATION THAT PETITIONER WAS NOT PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS COUNSEL.

The panel majority's determination that petitioner was not prejudiced at sentencing is replete with at least six legal errors and conflicts with this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), and with precedents of numerous circuits. The majority applied the wrong legal standard – looking only to the balance of aggravating and mitigating circumstances, while ignoring whether the evidence would have affected the jurors' sense of petitioner's moral culpability – and considered an aggravating circumstance that was unconstitutional under settled law. Moreover, the majority failed to consider the mitigating evidence in its totality, looking instead to only two pieces of evidence that it erroneously construed as "harmful."[7] The majority furthermore failed to take into account that only a single juror had to believe that life imprisonment was the appropriate punishment. And finally, it failed to give weight to the fact that petitioner's counsel introduced no mitigating evidence at all (such that imposition of the death penalty was essentially automatic). Before addressing these points, we detail the mitigating evidence found by the district judge and describe decisions of several circuits finding prejudice on indistinguishable facts.

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[7] The Court may wish to consider granting certiorari, vacating the judgment below, and remanding this case for further consideration in light of the Court's opinion in No. 00-6677, *Penry* v. *Johnson* (argued Mar. 27, 2001), to the extent that opinion addresses the proper treatment of mitigating evidence.

A. The Extraordinary Mitigating Evidence In This Case.

The Sixth Circuit found no prejudice, and thus no constitutional error, in the failure of petitioner's trial counsel to introduce an extraordinary array of evidence.

Vicious Abuse. The jury never learned of the extraordinary abuse petitioner suffered as a child. As the district court found, petitioner suffered "regular beatings" and other "extraordinary abuse," including (Pet. App. 89a (record citations omitted)):

> Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit.

See also *id.* at 42a (four witnesses could have testified to the abuse, including one witness with particularly "impress[ive] credibility and demeanor"), 89a (testimony of abuse was "vivid" and failure to present it was "a grave omission").

Petitioner's Dysfunctional Family History Arising From Mental Illness. The district court found, but the jury did not know, that petitioner's immediate family – and thus petitioner's upbringing – was replete with mental illness and depression. Petitioner's sister repeatedly attempted suicide and was repeatedly institutionalized, while Petitioner's brother committed suicide after being arrested for physically and sexually abusing his own children. Pet. App. 91 & n.33. "To call [petitioner's] family dysfunctional," the district court concluded, "would be an understatement." *Id.* 91a.

Petitioner's Own Mental Illness. The district court found that petitioner's counsel should have introduced "evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior." Pet. App. 91a. Beginning at a young age, petitioner was diagnosed as having a "'paranoid personality'" and "'passive aggressive personality,'" as being "'very sick' and in need of *immediate*

commitment," and as being "in serious need of therapy" and "highly disturbed." *Id.* 90a (record citations omitted) (emphasis added). Petitioner repeatedly attempted suicide. *Id.* His mental illness repeatedly manifested itself in his "belief that he and his wife would have the next Messiah," his "conversations with nonexistent people and animals," and his practice of repeatedly "bang[ing] his head against the wall." *Id.* 91a. But, "[a]gain, none of this was made known to the jury." *Id.*

Petitioner's Good Character and Contributions To Society. The district court found that competent counsel would "have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society." Pet. App. 92a. For example, petitioner's former fiancée, who broke off the engagement because of petitioner's psychological problems, would have testified that "he was hard-working and giving" and was "gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief." *Id.* Petitioner thus "held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence." *Id.* The district court specifically found that the testimony would have been "extremely credible" and "compelling" to the sentencing jurors, in both "content" and "demeanor," including because the fiancée was an attorney who "has represented the State of Maine on two murder appeals." *Id.* 92a n.35.

Evidence Mitigating the Crime Itself. The district court found that competent counsel would have introduced evidence of petitioner's "history of earnestly seeking a religious faith with which to align himself." Pet. App. 92a. That evidence would have supported petitioner's argument that he was less culpable for the crime because petitioner "had been strongly influenced by the SEGM." *Id.* That "[n]one of this was put into evidence before the jury" "was a serious error." *Id.*

Mitigating Circumstances of the Prosecutors' Principal Aggravator. The principal aggravating circumstance invoked by the prosecution at trial was that petitioner had previously killed a fellow prison inmate. But while the prosecution had described

the killing as a gang-related drug crime (and indeed had misled even petitioner's counsel to that effect), in reality that crime was committed in reaction to a series of homosexual rapes petitioner suffered in prison. Pet. App. 93a. The district court found "important" available testimony from a psychiatrist – who also diagnosed petitioner "as having a Borderline Personality Disorder and Schizoid Personality" – that the homicide had resulted from a "'homosexual panic'" in which petitioner "lost control." *Id.* Prison records never provided to the jury flatly stated that the homicide "arose out of an attempted assault [on petitioner] approximately two weeks earlier" by a group "attempting to apply extortionate pressures on [petitioner] to submit to [the victim's] demands for homosexual activities." *Id.* 93a n.37.[8] "Although this information does not provide a justification for the murder," the district court explained, it did provide critical information to the jury: "Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency." *Id.* 93a-94a.

B. The Decision Below Conflicts With Precedents Of Four Circuits On Indistinguishable Facts.

Before exploring each of errors pervading the panel majority's prejudice analysis, we discuss decisions of the Fifth, Seventh, Eighth, and Eleventh Circuits applying the correct prejudice analysis on indistinguishable facts and in square conflict with the decision below. Certiorari should be granted on the basis of this conflict, as well as the further subsidiary conflicts described at greater length *infra*.

First is Judge Posner's opinion for the Seventh Circuit in *Emerson* v. *Gramley*, 91 F.3d 898 (CA7 1996), *cert. denied*, 520 U.S. 1122, 1139 (1997),[9] in which the court acknowledged that

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[8] The district court found that the state's failure to turn over records pertaining to the prior conviction violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Pet. App. 69a-73a.

[9] The parallel between *Emerson* and this case is all the more striking because the Seventh Circuit held that the state had waived an argument by not raising it expressly.

the favorable context of the "mitigating evidence" was "outweighed or at least offset" by the "additional evidence of criminal and other antisocial behavior" it contained, including evidence of "a number of criminal acts" such as "arson," "armed robbery," and "attempted murder." The court nonetheless found prejudice because the evidence could have demonstrated that the defendant's life was worth saving, precisely the inquiry mandated by *Williams* but not undertaken by the majority below (91 F.3d at 906-07 (emphasis added)):

> With no evidence of mitigation before the jury despite irrefutable evidence of aggravating circumstances, with need to convince only *one of twelve jurors* to refuse to go along with a death sentence, and with no statutory or caselaw definition of mitigating circumstances that might enable us to say that the mitigating circumstances found in the investigation by Emerson's current lawyers are in fact irrelevant, the possibility that a case in mitigation along the lines devised by these lawyers might have saved Emerson from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of Emerson's child, possibly strangled by her mother, and the death of one of Emerson's brothers by shooting), as to reduce Emerson's *moral responsibility* for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy.[10]

Second is *Lockett* v. *Anderson*, 230 F.3d 695, 710-11 (CA5 2000), in which the Fifth Circuit (after this Court's decision in *Williams*) reversed the district court's ruling that, because the available mitigating evidence regarding his "mental and emotional problems" was potentially "more harmful than helpful,"

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[10] An even more extensive mitigation report was introduced in the district court in this case. See Pet'r Dist. Ct. Exh. 141 (report of Dr. Diana McCoy; 38-page single-spaced report plus extensive appendices).

the defendant was not prejudiced by counsel's failure to introduce it. The court recognized the "tension here between a possible jury finding of reduced culpability versus the possible conclusion that Lockett's mental problems aggravated the threat of future dangerousness," and that the homicides in that case involved "undeniable gravity, cruelty and deliberateness": "a calculated double-murder—involving an ambush, multiple shootings, kidnapping and execution—of an innocent couple." 230 F.3d at 715-16. The Fifth Circuit nonetheless found prejudice (*id.* at 716 (emphasis added) (citation omitted)):

> A sentence of death in Mississippi requires unanimity among all jurors. If we can conclude that *a juror* could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established. If the medical opinion testimony in this case—that Lockett suffered from some organic brain disorder that tended to explain his violent conduct and made him less able to control his behavior than a normal person—had been presented to the jury, we think a reasonable juror could have found that his particular mental condition, which resulted from no fault of his own, made him *less morally culpable* for his cruel and senseless crime.

The court concluded (*id.*):

> We just cannot say with any degree of confidence that an objectively reasonable juror, confronted with this mitigating evidence, might not have reached the conclusion that Lockett lacked the requisite level of culpability to be punished with death.
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> * * * *
>
> [T]he fact that counsel did not even investigate this mitigating evidence, combined with the general lack of any mitigating evidence before the jury, denied Lockett any opportunity, vouchsafed by the law, to avoid the death penalty.

The Eleventh Circuit reached the same conclusion as well in *Harris* v. *Dugger*, 874 F.2d 756, 764 (CA11), *cert. denied*, 493

U.S. 1011 (1989), in which it recognized that the mitigation evidence was "fraught with danger" because it "would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army," but nonetheless found prejudice because "[t]estimony about the appellant's good character constituted the only means of showing that Harris was perhaps less reprehensible than the facts of the murder indicated." *Id.* See also *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (CA5 1983) (failure to introduce mitigating evidence "deprived [defendant] of the possibility of bringing out even a single mitigating factor"; district court's view that evidence "in mitigation would do more harm than good" was "sheer speculation").

* * * *

This division in authority regarding whether a defendant is prejudiced under *Strickland* by counsel's failure to introduce mitigating evidence at a capital sentencing hearing, "aspects" of which may be "harmful," should be resolved by the Court in this case. We now proceed to address in greater detail each of the six respects in which the Sixth Circuit's prejudice analysis is erroneous.

C. The Majority Below Failed to Consider Whether the Mitigating Evidence Would Have Affected the Jurors' Sense of Petitioner's "Moral Culpability."

This Court held in *Williams* v. *Taylor*, 529 U.S. 362 (2000), that the Virginia Supreme Court engaged in an erroneous – indeed, an "unreasonable" – application of the *Strickland* standard when it rejected a claim of prejudice on the ground that the available mitigating evidence was limited in scope and to some extent reflected negatively on the defendant.[11] This Court held that the proper prejudice inquiry was whether the "totality of the available mitigation evidence" would "have influenced the jury's appraisal of [the defendant's] moral culpability." 529

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[11] Unlike *Williams*, this case is not governed by the AEDPA (see *supra* at 2 n.3), and accordingly the heightened "unreasonable application" standard does not apply. See *Williams*, 529 U.S. at 403 (O'Connor, J. concurring).

U.S. at 397-98. Prejudice exists, this Court held, "even if [the evidence] does *not* undermine or rebut the prosecution's death-eligibility case." *Id.* at 398 (emphasis added). See also *id.* (prejudice exists even if mitigating evidence "may not have overcome" the aggravating circumstances found by the jury). See also *Lambright* v. *Stewart*, 241 F.3d 1201, 1208 (CA9 2001) (recognizing, in light of *Williams*, that "[e]vidence of mental disabilities or a tragic childhood can affect a sentencing determination in even *the most savage* case" (emphasis added)).

The Sixth Circuit's standard for determining prejudice is irreconcilable with *Williams* and conflicts with the circuit court decisions detailed *supra*. Consistent with *Williams*, the district court in this case found prejudice in substantial part based on its recognition that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable.'" Pet. App. 87a (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)). By contrast, in reversing the district court's finding of prejudice, the majority below totally failed to consider that question, and thus failed to consider whether the mitigating evidence would have altered the jurors' view of petitioner's individual culpability. Instead, it addressed *only* whether the sentencing jury "would have concluded that the balance of aggravating and mitigating factors did not warrant death," Pet. App. 20a, notwithstanding the square holding of *Williams* that prejudice may exist even if the mitigating evidence would *not* outweigh the aggravating circumstances found by the jury, 529 U.S. at 398.

There is no question that the erroneous test employed by the majority below profoundly affected its determination to reinstate petitioner's death sentence. The *majority itself* expressly acknowledged that "the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling." Pet. App. 20a. Similarly, the district court correctly recognized that *multiple* classes of compelling mitigating evidence in this case would have impressed upon jurors that petitioner was less morally culpable for this homicide, such that life in prison rather than death would be the appropriate penalty. *Id.* 96a. And even respondent recognized the extraordinary strength of the mitigat-

ing evidence when it *did not appeal* the finding of prejudice based on the federal court record.

D. The Majority Below Erroneously Failed To Consider the "Totality" of the Mitigating Evidence Because "Aspects" of the Evidence Were Supposedly "Harmful."

Wholly apart from the appropriate approach for determining prejudice, the decision below is irreconcilable with *Williams*' holding that, in making the prejudice determination, a reviewing court must consider the "totality" of the available mitigating evidence, even when some evidence is said to contain harmful elements. 529 U.S. at 396-97. The presence of such negative material, this Court specifically concluded, does not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [the defendant's] favor." *Id.* at 396.

The decision below rests on precisely the same error as the prejudice determination reversed by this Court in *Williams* and conflicts with the circuit court decisions described *supra*. The Sixth Circuit majority opined that the available mitigating proof "has aspects that would be compelling evidence of aggravating circumstances": "a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits." Pet. App. 20a. In light of that potentially harmful evidence, the majority did not consider any of the remaining mitigating evidence found by the district court. *Id.* But this Court rejected that approach in *Williams*, holding both that (i) a reviewing court must consider the "totality" of the mitigating proof, and (ii) the presence of such "harmful" materials would not justify counsel's failure to introduce the remainder of the mitigating evidence.

The majority's failure to consider the "totality" of the mitigating evidence profoundly affected the outcome of this case. No matter whether the proper prejudice inquiry is into the jurors' sense of the defendant's "moral culpability" (*Williams*, 529 U.S. at 398) or instead into the balance of aggravating and mitigating factors (Pet. App. 20a), the record in this case establishes prejudice. Certainly, the mitigating evidence found by the district court is markedly stronger than the evidence in *Williams*, in which this Court found prejudice because the jury was not ad-

vised of "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded.'" 529 U.S. at 398.

There also is no doubt that, on this record, other circuits would have sustained the district court's finding of prejudice. Because a summary of appellate decisions finding prejudice on less compelling records in conflict with the decision below would easily fill this petition, we have instead compiled a list of representative cases, identifying with each the classes of evidence on which the court relied. See Pet. App. 157a-159a. Any fair review of those decisions reveals that *none* involved nearly the breadth or depth of mitigating evidence as this case.

E. The Majority Below Gave Impermissible Weight to the Aggravating Circumstances.

The panel majority's erroneous prejudice analysis was compounded by its treatment of the aggravating circumstances. The majority reversed the district court's finding of prejudice based on its view that the jury would not find that the mitigating evidence outweighed the three aggravating circumstances. See Pet. App. 20a. Under settled Sixth Circuit precedent, however, one of those aggravating circumstances – the HAC aggravator – *was unconstitutionally vague* because the jury did not make any finding that would have narrowed its application. See *Coe* v. *Bell*, 161 F.3d 320 (CA6 1998), *cert. denied*, 528 U.S. 842 (1999); *Houston* v. *Dutton*, 50 F.3d 381 (CA6 1995), *cert. denied*, 516 U.S. 905 (1995).

The panel majority had found that the use of the unconstitutional HAC aggravator at petitioner's sentencing was harmless error only because there was insufficient mitigating evidence (*i.e.*, none) introduced at the original sentencing to overcome the remaining two aggravators. Pet. App. 24a n.6.[12] But the major-

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[12] The majority's assertion that petitioner's counsel had not requested that the Sixth Circuit consider the federal court record with respect to the HAC aggravator, Pet. App. 24a n.6, is totally false, and we specifically defy respondent to defend it. Petitioner expressly argued that "[t]he error was not harmless" in light of "the ineffective assistance of counsel that pervaded the sentencing hearing in this trial," and in the same sentence referred the court to a six-page

ity inexplicably proceeded to *consider* the unconstitutionally vague "heinous, atrocious, or cruel" aggravator in its determination that the jurors would not have "concluded that the balance of aggravating and mitigating factors did not warrant death." Pet. App. 19a. In particular, Judge Batchelder expressly rested her vote to reverse on the HAC aggravator: "What the state court said in 1995 holds true today: 'It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances *including the heinousness of the killing*.'" *Id.* 38a (emphasis added).

The decision below thus conflicts directly with *Battenfield* v. *Gibson*, 236 F.3d 1215 (CA10 2001). In that case, as here, an unconstitutional HAC aggravator had been employed at the defendant's trial, defendant's counsel had failed to introduce any mitigating evidence, and the primary aggravating factor on which the state relied (a prior violent assault) was the subject of available mitigating evidence. 236 F.3d at 1234-35. The mitigating evidence, however, "just as easily could have had an unintended and negative effect upon the jury." *Id.* at 1238 (Kelly, J., concurring in part and dissenting in part). The Tenth Circuit nonetheless found that the invalid HAC aggravator was not rendered harmless by other aggravating circumstances. *Id.* at 1234. Instead, it found that the failure to introduce the mitigating evidence was prejudicial, taking care to "emphasize" that the defendant's counsel's "failure to present any mitigating evidence during the penalty phase" meant that the jurors lacked "information about Battenfield's background, personality, and the facts of his prior conviction." *Id.* at 1235. The court relied on its prior circuit precedent describing the "'overwhelming importance' of

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single-spaced discussion of the mitigation evidence developed in the federal court. Pet'r C.A. Reply Br. 9-15 nn.6-7, 21. We also invite respondent to explain on what conceivable basis the Sixth Circuit could have been justified in reinstating petitioner's death sentence by *sua sponte* reaching the prejudice argument waived by the state while simultaneously purporting to hold that petitioner also must be sentenced to death because, although an unconstitutional instruction was used at petitioner's trial, that error was harmless because his counsel had *waived* on appeal a particular evidentiary argument.

mitigation evidence in humanizing a criminal defendant and explaining his conduct." *Id.* (quoting *Mayes* v. *Gibson*, 210 F.3d 1284, 1288 (CA10 2000)).

F. The Majority Below Erroneously Treated Aspects of the Mitigating Evidence As "Harmful."

This Court found prejudice in *Williams* v. *Taylor* notwithstanding that the mitigating evidence in that case would have revealed to the jury that the defendant had engaged in substantial additional violent conduct. The Court explained that evidence describing the defendant's previous violent actions was, in reality, mitigating because it was "consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." 529 U.S. at 398. In this case, by contrast, the panel majority reversed the district court's finding of prejudice because the mitigating evidence "contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits." Pet. App. 20a.

The decision below is irreconcilable with *Williams*. As the district court found, the evidence regarding petitioner's killing of a prison inmate was vital to *avoiding* the death penalty, not "harmful." The evidence did not merely explain petitioner's "motive for killing a fellow prison inmate" as the majority below blithely asserted. Pet. App. 20a. Instead, it demonstrated that the killing – which the prosecution had described as a drug crime – was in fact petitioner's compulsive reaction to having been repeatedly *raped* by a group of inmates, including the victim. See *supra* at 13-14. The evidence specifically included medical testimony that petitioner committed the killing when he "'lost control.'" Pet. App. 93a. *Williams* confirms that the district court was quite right to conclude, and the majority below was wrong to ignore, that "[w]ithout some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency." *Id.* 93a-94a.

To the same effect is the mitigating evidence that the panel majority characterized as reflecting petitioner's supposed "his-

tory of violent character traits." That evidence would have been presented through psychiatric diagnoses that petitioner suffered from mental illnesses, see *supra* at 14, which not only is "consistent with" a portrait of petitioner as unable to control violent outbursts (as in *Williams*), but it even more powerfully sets forth medical *diagnoses* to that effect. Such proof is precisely the type of mitigating evidence that *Williams* explains would inform the jury that petitioner was not a cold-blooded, premeditated killer undeserving of mercy.

Furthermore, the panel majority was wrong as a matter of law to reason that evidence of petitioner's supposed "violent character traits" would have been admissible as "evidence of aggravating circumstances." Pet. App. 20a. After the briefing and argument in this case, the Sixth Circuit itself held that Tennessee law permits the state to introduce evidence only if relevant to a specific aggravating circumstance. *Carter* v. *Bell*, 218 F.3d 581, 589 (CA6 2000). Evidence of petitioner's supposed "violent character traits," Pet. App. 20a, was not relevant to any of the three aggravating circumstances put before the jury – (i) petitioner's two prior felonies; (ii) the supposed "heinous, atrocious, or cruel" nature of this offense; and (iii) the fact that this offense occurred in the course of a robbery – and would not have rebutted petitioner's case in mitigation. The basis for finding prejudice here is accordingly stronger than in *Williams*, where the negative evidence at least would have been admissible in support of the "future dangerousness" aggravating circumstance employed in that case. 529 U.S. at 370.

Finally, even if admissible, the supposedly "harmful" evidence was cumulative of facts that the jurors already knew about petitioner – *i.e.*, that he had a violent past. "[T]he jury already had much of this evidence * * * before it." Pet. App. 45a (Cole, J., dissenting). In similar circumstances, the Eighth Circuit has twice rejected claims that a defendant was not prejudiced by the failure to introduce mitigating evidence that contained assertedly negative information. See *Kenley* v. *Armontrout*, 937 F.2d 1298, 1308 (CA8) (rejecting conclusion of state courts and district court that "the mitigating evidence would have been more damaging" because "the testimony would have put the aggravating evidence in context" and "the aggravating information was

mostly cumulative"), *cert. denied*, 502 U.S. 964 (1991); *Chambers* v. *Armontrout*, 907 F.2d 825, 831-32 (CA8) (en banc) (emphasizing that "damaging testimony was merely cumulative of several of the State's witnesses' testimony" and finding prejudice because jurors were left "without any explanation that would support a verdict of less than capital murder and sentence of less than death"), *cert. denied*, 498 U.S. 950 (1990).

G. The Majority Below Failed To Account for the Ability of a Single Juror to Impose a Life Sentence.

The district court in this case also found it significant that, as a matter of Tennessee law, petitioner would have been sentenced to life in prison if even a single juror had concluded that the death penalty was inappropriate. Pet. App. 96a. The majority below agreed that the "supplemental evidence contains mitigating evidence that *a sentencer* might find to be compelling," but found no prejudice because the mitigating evidence would not have had a sufficient effect on "the *sentencing jury*." *Id.* 20a (emphasis added). See also *id.* 19a (looking to effect on "the sentencing jury")). In *Williams* v. *Taylor*, the Fourth Circuit took the same approach. 163 F.3d 860, 868 (CA4 1998) ("A court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. * * * Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice."). This Court granted certiorari to decide that question in *Williams*, upon which the circuits remain divided, but ultimately did not reach the issue.

In square conflict with the decision below and the Fourth Circuit's decision in *Williams*, other circuits attribute special significance to the fact that a single juror could require the imposition of the death penalty if persuaded by mitigating evidence. Those courts reason that, because the proper inquiry under *Strickland* is whether there is a "reasonable probability that the outcome would have been different" absent counsel's failures (446 U.S. at 694), it is essential to account for the particular circumstances in which a life sentence would have been imposed at trial.

The Seventh and Eighth Circuits employed that approach in the *Emerson* and *Lockett* cases discussed at length *supra* at 14-16. Similarly, in *Mak* v. *Blodgett*, 970 F.2d 614, 621 (CA9 1992), *cert. denied*, 507 U.S. 951 (1993), the Ninth Circuit rejected the state's argument that the district court had erred in finding prejudice by considering the effect of mitigating evidence on a single juror: "the effect-on-one-juror approach comports with Washington death penalty law. The law of Washington, upon which *Strickland* presumes each juror has based his or her decision, allows any one juror to set aside the death penalty." The Third and Fifth Circuits have reached the same conclusion. See *Neal* v. *Puckett*, 239 F.3d 683, 691 (CA5 2001); *Frey* v. *Fulcomer*, 974 F.2d 348, 368 (CA3 1992), *cert. denied*, 507 U.S. 954 (1993).[13]

H. The Majority Below Failed To Account for Counsel's Failure to Introduce Any Mitigating Evidence.

Finally, the district court emphasized that this is not a case in which the defendant's counsel merely failed to put on *some* mitigation evidence –*no* evidence was introduced at all, such that the jury was provided no reason whatsoever to spare petitioner's life. Pet. App. 96a. The majority below, by contrast, attributed no weight to that fact. *Id.* 20a.

The Sixth Circuit's analysis is not only in substantial tension with *Williams* v. *Taylor*, see 529 U.S. at 415 (O'Connor, J., concurring) (emphasizing that defendant's counsel in that case "provided the jury with no reasons to spare petitioner's life"), but it also conflicts directly with decisions of other courts of appeals. Those courts, like the district court in this case, attribute considerable significance in the determination of prejudice to the total failure of counsel to introduce any mitigating evidence.

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[13] See also *Lockett* v. *Anderson*, 230 F.3d 695, 716 (CA5 2000); *Hall* v. *Washington*, 106 F.3d 742, 753 (CA7), *cert. denied*, 521 U.S. 1118 (1997); *Rupe* v. *Wood*, 93 F.3d 1434, 1441 (CA9 1996), *cert. denied*, 519 U.S. 1142 (1997); *Antwine* v. *Delo*, 54 F.3d 1357, 1368 (CA8 1995), *cert. denied*, 516 U.S. 1067 (1996); *Loyd* v. *Smith*, 899 F.2d 1416, 1426 (CA5 1990); *Kubat* v. *Thieret*, 867 F.2d 351, 369 (CA7), *cert. denied*, 493 U.S. 874 (1989); *Lewis* v. *Lane*, 832 F.2d 1446, 1458 (CA7 1987), *cert. denied*, 488 U.S. 829 (1988).

They recognize that under sentencing schemes like Tennessee's, without mitigating evidence, a sentencer has "no choice" but to impose the death penalty. *Hall* v. *Washington*, 106 F.3d 742, 752 (CA7), *cert. denied*, 522 U.S. 907 (1997). See also *Smith* v. *Stewart*, 140 F.3d 1263, 1270 (CA9) (vacating death sentence because failure to introduce mitigating evidence amounted to "a virtual admission that the death penalty should be imposed"), *cert. denied*, 525 U.S. 929 (1998). Other circuits have also emphasized that mitigating evidence is absolutely vital if the jury is to make the individualized sentencing determination required by this Court's Eighth Amendment jurisprudence. *E.g.*, *Harris* v. *Dugger*, 874 F.2d 756, 763 (CA11) (citing, *inter alia*, *Gregg* v. *Georgia*, 428 U.S. 153, 206 (1976)), *cert. denied*, 493 U.S. 1011 (1989). See also *Deutscher* v. *Whitley*, 884 F.2d 1152, 1162 (CA9 1989) (where counsel "failed to present any mitigation evidence at all," failure to find prejudice would rest on pure "speculation about what might have happened if dozens of important variables had been different"); *supra* at 14-16 (discussing Seventh Circuit's decision in *Emerson* and Eighth Circuit's decision in *Lockett*).

Certiorari accordingly should be granted to address the six different errors that pervade the prejudice analysis employed by the majority below.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER JURY INSTRUCTIONS AND VERDICT FORMS LIKE THOSE USED TO SENTENCE PETITIONER UNCONSTITUTIONALLY REQUIRE JUROR UNANIMITY.

The Eighth Amendment "requires that *each juror* be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy* v. *North Carolina*, 494 U.S. 433, 442-43 (1990) (applying *Mills* v. *Maryland*, 486 U.S. 367 (1988)) (emphasis added). This principle is violated when "there is a reasonable likelihood" that jurors understood the instructions given by the trial judge and the verdict form to permit consideration of only unanimously found mitigating circumstances. *Boyde* v. *California*, 494 U.S. 370, 375-76, 380 (1990).

In this case, the jury instructions, as well as the "Punishment of Death" verdict form mandated by Tennessee law, manifestly created "a reasonable likelihood" that the jurors believed their determinations regarding mitigating circumstances must be unanimous. The form required the jury to certify that "'[w]e, the jury, *unanimously find* that there are *no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.'" Pet. App. 161a (emphasis added). The jury instructions provided, *inter alia*, that "the jury must include in its finding that the statutory aggravating circumstance or circumstances so found *outweigh any mitigating circumstances. Upon such unanimous finding*, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court." *Id.* 164a (emphasis added). The form and charge contain numerous other references to the requirement of a "unanimous determination" in close proximity to the discussion of mitigating factors. See generally *id.* 160a-165a.

In recognition of the dangers attendant upon the instructions and jury form as they existed at the time of petitioner's trial, Tennessee subsequently amended its pattern jury instructions to advise jurors that "[t]here is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance." 7 Tennessee Pattern Instructions 88 (West 4th ed. 1995). As this Court recognized in *Mills*, such a post-trial change is "evidence about the natural interpretation" of the language at issue. 486 U.S. at 381.

The Sixth Circuit, however, rejected petitioner's Eighth Amendment claim on the ground that "the proximity of the terms 'unanimous' and 'mitigating circumstances'" was "not enough to have created a reasonable likelihood that the jury applied the challenged instruction in a way that prevented consideration of constitutionally relevant evidence."[14]

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[14] The panel majority furthermore held that any possibility that the jurors were misled was harmless because petitioner's trial counsel failed to introduce any mitigating evidence. Pet. App. 27a n.7. That finding of harmlessness, however, simply ignores that the failure to introduce the available mitigating evidence resulted from the concededly constitutionally deficient performance of

This case magnifies a longstanding split between a number of circuit courts and state high courts, on the one hand, and the Third Circuit, in which the form and instructions used here would have been held invalid, on the other. In *Frey* v. *Fulcomer*, 132 F.3d 916, 922 (CA3 1997) (per Becker, J.), *cert. denied*, 524 U.S. 911 (1998), the Third Circuit invalidated an instruction advising jurors that "your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances (sic) and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances." The court held that the Constitution is violated by language requiring unanimity "frequently and in close proximity to * * * the mitigating circumstances clause" such that "to the ear and to the mind" the clause "is one sound bite." 132 F.3d at 923. The Third Circuit explained that, because the unanimity requirement appeared "within seven words [] of the mitigating circumstances clause" and "the unanimity language * * * could only modify the term 'find,'" "the jury could reasonably have believed that unanimity was required in both its ultimate and interim conclusions," including its conclusions regarding the existence of mitigating circumstances. *Id.* See also *Jermyn* v. *Horn*, No. 1:CV-97-634, 1998 U.S. Dist. LEXIS 16939, at *124 (E.D. Pa. Oct. 27, 1998) (ordering resentencing on the basis of "the same offensive proximity between the word 'unanimously' and the phrase 'mitigating circumstances'" as in *Frey*). On the basis of *Frey*, the Third Circuit would certainly find the verdict form and instructions in this case unconstitutional, given that the instructions placed the terms "unanimous" and "mitigating circumstances" in even greater proximity (four words rather than seven) and that the verdict form contained the identical ambiguity regarding what the jurors were required to "find."

Other circuit courts and state high courts have declined to follow *Frey* or have issued decisions that, like the decision below, are irreconcilable with it. See, *e.g.*, *Duvall* v. *Reynolds*, 139 F.3d 768, 791-92 (CA10), *cert. denied*, 525 U.S. 933

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petitioner's counsel. The circuit conflict discussed in this section accordingly is squarely presented by this case.

(1998); *Griffin* v. *Delo*, 33 F.3d 895, 905-06 (CA8 1994), *cert. denied*, 514 U.S. 119 (1995); *Commonwealth* v. *Cross*, 726 A.2d 333, 337 (Pa. 1999). The conflict has been acknowledged by courts and by the literature. *Banks* v. *Horn*, 63 F. Supp. 2d 525, 544 (M.D. Pa. 1999); *Sentencing: Capital Punishment*, 88 Geo. L.J. 1560, 1575 n.2279 (2000). The conflict furthermore calls for immediate resolution because the Pennsylvania Supreme Court has itself refused to follow *Frey*, creating an intractable split in authority *within* a single jurisdiction. *Commonweath* v. *Rollins*, 738 A.2d 435, 450 n.15 (Pa. 1999).

The Seventh Circuit would similarly find an Eighth Amendment violation in this case. The instructions in *Kubat* v. *Thieret*, 867 F.2d 351 (CA7), *cert. denied*, 493 U.S. 874 (1989), were identical in substance to those employed at petitioner's trial. In both cases, the jury was instructed that life imprisonment would be imposed if it "unanimously" concluded that the aggravating circumstances did not outweigh the mitigating circumstances. Compare 867 F.2d at 369-70 (instr. 6, ¶ 2; instr. 7, ¶ 3) with Pet. App. 164-65a. Such instructions, the Seventh Circuit explained, creates the risk that if "one juror thought that the death penalty should not be imposed, he or she might have submitted to the views of the other eleven because of the mistaken belief that unanimity was required," and thus create "a substantial possibility that one or more of [petitioner's] jurors might have been precluded from granting mercy" in violation of the Eighth Amendment as construed by this Court in *Mills*. 867 F.2d at 371, 373.[15]

The Sixth Circuit in this case found that the "language [of the instructions] requires unanimity as to the results of the weighing," Pet. App. 26a (internal quotation marks and citation omitted), but, taking a diametrically opposite approach from the Seventh Circuit, it held that this actually *insulated* the instructions from constitutional challenge, *id.* 27a. The decision below thus creates a conflict between the Sixth and Seventh Circuits about

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[15] The Seventh Circuit's holding that the instructions violated state law, 867 F.2d at 369-70, is of course irrelevant to its holding that the "instructions violated the Eighth and Fourteenth Amendments and, on that basis alone, Kubat's sentence cannot stand," *id.* at 374.

the propriety of instructions requiring unanimity before a life sentence may be imposed.

* * * *

We adopt the conclusion of the district judge in this case, the only judge to have heard and considered all of the available mitigating evidence and applied the proper test for determining prejudice under this Court's precedents (Pet. App. 97a):

> The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 21, 2001.

APPENDIX

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellant/Cross-Appellee.

Case Nos. 98-6568/6569

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 96-00380--Todd J. Campbell, District Judge.

Argued: January 31, 2000
Decided and Filed: September 13, 2000

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, Brian K. Frazier, NEAL & HARWELL, Nashville, Tennessee, for Appellee.

SILER, J., delivered the opinion of the court. BATCHELDER, J. (pp. 34-41), delivered a separate concurring opinion. COLE, J. (pp. 42-50), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, Circuit Judge. Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"),[1] vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

Petitioner was tried and convicted of first-degree murder, assault with intent to commit murder, and armed robbery. He received the death penalty for the murder conviction and two consecutive life terms for the each of the other convictions. The death sentence was imposed pursuant to the jury's finding of three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, or kidnapping. Petitioner's convictions arose out of an offense that occurred in 1986.

On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. The plan

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[1]Petitioner was originally named James Lee Jones, but he changed his name to Abu-Ali Abdur'Rahman.

was for Petitioner to enter the duplex under the pretext of making a drug purchase, at which point Miller would force his way into the duplex and "rob" both Daniels and Petitioner with a shotgun that Petitioner had supplied. This plan was never executed, however, as Miller became too frightened to go through with it. Petitioner then formulated a second plan to rob Daniels, this time using a knife to avoid making too much noise.

On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.

Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

At trial, Petitioner argued that the real motivation for the crime was born out of the influence of his membership in a "quasi-religious paramilitary group" called the Southeastern Gospel Ministry ("SEGM"). Petitioner had a long criminal history, including a conviction for second-degree murder in 1972 and a conviction for assault with a dangerous weapon (a knife) in 1970. Following his incarceration for these offenses, he moved to a halfway house in Nashville. While living at the halfway house he worked for an organization called the Baptist Publishing Board, and eventually met Allen

Boyd, one of the Board's owners, and Boyd's associate, William Beard. Boyd and Beard were the leaders of the SEGM; Miller was also a member of the SEGM. One of the alleged goals of the SEGM was to cleanse the black community of drug dealers and other undesirable elements. Boyd allegedly furnished the shotgun used during the offense and assisted Petitioner and Miller after the offense, including giving Miller some money to flee.

Petitioner was initially represented by Neal McAlpin, who was asked by Boyd to take on the representation. Boyd allegedly indicated to McAlpin that he would be paying Petitioner's attorney's fees. However, McAlpin subsequently determined that Boyd was a member of the SEGM. With Boyd being the source of his fees, as well as perhaps being involved in the crime, McAlpin felt that a conflict of interest existed within the third-party fee arrangement and that he could not continue the representation. Gail Hughes, an associate of Boyd's, then requested that Lionel Barrett represent Petitioner. Barrett agreed to do so for a retainer fee of $15,000, $5,000 of which was paid to him fairly soon, though he never inquired as to the source of the funds. Barrett and another attorney, Sumter Camp, represented Petitioner at trial.

Petitioner alleges that this representation was ineffective throughout the trial, including both the guilt phase and the sentencing phase. Barrett testified that at the time he received the first $5,000 of the retainer he decided he was not going to perform any work on the case until he received the balance of the retainer fee, a balance that was never paid. Petitioner also claims that Barrett performed no work on the case until he filed pre-trial motions. Petitioner alleges that Barrett's performance as counsel was ineffective due to failure to: (1) investigate; (2) present potentially exculpatory evidence; and (3) present mitigating evidence at the sentencing stage.

His conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). He sought post-conviction relief in the state trial court which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995

WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review. The United States Supreme Court denied a petition for a writ of certiorari in *Jones v. Tennessee*, 516 U.S. 1122 (1996). Petitioner later filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. After Petitioner's motion for partial summary judgment was denied, the district court held an evidentiary hearing to address the merits of his habeas petition. The district court granted the writ on Petitioner's claim of ineffective assistance of counsel at the sentencing stage due to counsel's failure to present mitigating evidence despite its availability. However, the district court denied Petitioner's claim of ineffective assistance of counsel at the guilt stage, holding that although the performance of Barrett and Camp was deficient, Petitioner suffered no prejudice thereby. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). This is an appeal from that decision.

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

1. Presumption of Correctness Under 28 U.S.C. § 2254

The State argues that the district court improperly dispensed with the presumption of correctness that is to be accorded to state court findings of fact under 28 U.S.C. § 2254(d)[2] without providing a statement of its reasons for

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[2] 28 U.S.C. § 2254(d) (repealed), in effect when the instant petition was filed, states:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;

doing so as required by *Sumner v. Mata*, 449 U.S. 539 (1981), and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997). Petitioner responds that claims of ineffective assistance of counsel involve mixed questions of law and fact that are not accorded the presumption of correctness under *Strickland v. Washington*, 466 U.S. 668 (1984).

The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the following factual findings in the process:

> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at Dupont Jr. High School at Ft. Lewis, Washington.
4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.
6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.
7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.
8. Testimony and files of trial counsel showed that they failed to investigate and obtain available

> information co[illegible]ning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.
>
> 9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI [Middle Tennessee Mental Health Institute] per their request.
>
> 10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.
>
> 11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.
>
> 12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.
>
> 13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

Abdur'Rahman, 999 F.Supp. at 1093. The district court referred to these findings in its opinion partially granting habeas relief, but did not address the presumption of correctness that arguably applied to them under 28 U.S.C. § 2254. Instead, citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984), and *Queen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), it merely noted that "[t]he ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo." *Abdur'Rahman*, 999 F.Supp. at 1092.

This was an accurate statement of the law by the district court, though not a complete one. A close reading of the

relevant portion of *Strickland* indicates that while the ultimate question of ineffective assistance of counsel is a mixed question of law and fact, the factual findings of state courts underlying such an analysis are accorded the presumption of correctness:

> **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),** and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added). Thus, the state post-conviction trial court's findings of fact underlying its ineffectiveness inquiry should have been presumed correct.

This presumption is not mandatory because a district court may preclude its application upon the finding of any one of the listed exceptions in 28 U.S.C. § 2254(d). However, in order to do so "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Sumner*, 449 U.S. at 551. In the recent opinion in *Mitchell v. Rees*, this court discussed this requirement.

> We begin with the application of 28 U.S.C. § 2254(d), which establishes a presumption of correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner. The Supreme Court, in *Sumner v. Mata*, held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that "'the facts of the present case' did not adequately support respondent's claim." The Court went on to lay down the rule that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that

> the state finding was 'not fairly supported by the record.'" The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'"
>
> . . . It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"

Mitchell, 114 F.3d at 575-77 (citations omitted). Thus, the district court committed the same error by apparently dispensing with the presumption of correctness without a statement of its reasons for granting relief notwithstanding the provisions of § 2254(d).

Relying solely upon the erroneous argument that the presumption of correctness does not apply to the post-conviction trial court's findings of fact, Petitioner fails to argue that any one of the listed exceptions in § 2254(d) applies and requires that the court dispense with the presumption of correctness. However, he argues that § 2254(d)(8) would entitle him to an evidentiary hearing, pointing to evidence in the record allegedly showing that he did not receive a full and fair hearing in state court at trial, during post-conviction proceedings, and on appeal. The State argues that due to Petitioner's formal presence before the state trial and appellate courts, his ability to call witnesses and otherwise present evidence, and his pursuit of his claims on

appeal, he cannot be heard to claim that he did not receive a full and fair hearing. This position is correct. *See Andrews v. Collins*, 21 F.3d 612, 619 (5th Cir. 1994) (noting that the opportunity to present evidence, to present witnesses, and to fully cross-examine prosecution witnesses supports the finding of a full and fair hearing); *see also Sumner*, 449 U.S. at 546 (stating that "[s]ince that court [state appellate court] was requested to determine the issue by respondent [the convicted murderer], we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d)."). Thus, because Petitioner received a full and fair hearing the presumption of correctness applies.

It is clear that the court erred in not addressing the presumption of correctness as required by *Sumner*, *Strickland*, and *Mitchell*. However, it is unclear as to whether the district court held that the presumption of correctness did not apply. This ambiguity arises because the district court ordered an evidentiary hearing and received evidence that was not presented in any of the state court proceedings. Additionally, it considered the new evidence in its opinion partially granting habeas relief to Petitioner, yet failed to explicitly find whether the new evidence contradicted and possibly rebutted the presumption of correctness, or merely supplemented the post-conviction trial court's findings of fact.

Presumably, however, because the court simply exercised de novo review under its mistaken interpretation of *Strickland* it did dispense with the presumption of correctness. Thus, the district court erred by failing to recognize that the presumption of correctness applied to the post-conviction trial court's findings of fact and erred by failing to include in its opinion the reasoning why the presumption of correctness did not apply. Unlike *Mitchell*, however, this error does not require a remand because we hold that the district court properly ordered an evidentiary hearing and properly considered the evidence it heard.

2. Inherent Discretion to Order an Evidentiary Hearing

Applying the presumption of correctness under § 2254(d) is an entirely separate and distinct issue from whether a district court may or is required to order an evidentiary hearing to settle allegedly disputed issues of material fact. However, as a practical matter, when a district court finds that the presumption of correctness does not apply due to one of the listed exceptions in § 2254(d), a hearing is probably warranted. As discussed below, this is an issue that is independent of whether a habeas Petitioner is *entitled* to an evidentiary hearing. This latter issue is not raised by the instant appeal, because the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority.

The district court ordered an evidentiary hearing "to resolve the numerous complex factual and legal issues presented." The State argues that the district court abused its discretion in ordering an evidentiary hearing because *Mitchell* does not allow for such a hearing in the absence of a finding of one of the § 2254(d) factors. Alternatively, it argues that Petitioner is not entitled to an evidentiary hearing due to his failure to show either cause and prejudice for the failure to develop the facts in the state proceedings or that a fundamental miscarriage of justice would result from the district court's failure to hold an evidentiary hearing. Petitioner responds by attempting to distinguish *Mitchell* and by arguing that a district court has inherent authority to order an evidentiary hearing to settle claims of ineffective assistance of counsel.

As the above-quoted portion of *Mitchell* shows, this court has held that a district court does not have the authority to order an evidentiary hearing when it fails to properly dispense with the presumption of correctness. Additionally, this court succinctly discussed the cause and prejudice requirements that the State argues are relevant to this appeal:

> Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of

> the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"
>
> Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. However, an [sic] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite showing.

Mitchell, 114 F.3d at 577 (citations omitted). Thus, strictly on the basis of *Mitchell*, because the district court did not find that one of the factors contained in § 2254(d) supplies, the court lacked the authority to order an evidentiary hearing.[3]

Petitioner argues that *Mitchell* is inconsistent with both Supreme Court authority and other authority emanating from this Circuit which recognizes that district courts always have

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[3] Petitioner attempts to distinguish *Mitchell* by arguing that the *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge involved therein was based solely upon factual state court findings, whereas the instant case involves an ineffectiveness of counsel claim that was clearly a mixed finding of fact and law. In turn, Petitioner argues that because the presumption of correctness does not apply in the instant case, *Mitchell* is not applicable and therefore not controlling. However, as the above-stated conclusion shows, the presumption of correctness does apply to the post-conviction trial court's findings of fact. Thus, Petitioner's attempt to distinguish *Mitchell* is erroneous.

the inherent authority to order evidentiary hearings to settle disputed issues of material fact. Petitioner cites and quotes to *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), for the proposition that "the power of inquiry on federal habeas review is plenary." *Id.* at 312. Although *Townsend* was partially overruled as discussed below, the Court set out six situations in which a district court on habeas review must hold an evidentiary hearing. *Id.* at 313-14. Additionally, the Court stated that:

> [t]he purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318. Thus, it seems that despite the holding in *Mitchell*, a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent.

This issue was further discussed in *Keeney*, which partially overruled *Townsend* by holding that the cause and prejudice test applies to a habeas petitioner's failure to develop material facts at the state court level. *See Keeney*, 504 U.S. at 5. In so holding, the Court discussed in a footnote the relation between the instances listed in *Townsend* in which a district court must hold an evidentiary hearing and the exceptions to the presumption of correctness listed in § 2254(d):

> First, it is evident that § 2254(d) does not codify *Townsend's* specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it

> lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Id. at 10 n.5. Thus, this passage indicates the continuing viability of *Townsend's* statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of the exceptions to the presumption of correctness listed in § 2254(d).

Thus, *Mitchell's* statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

Of course, recognizing a district court's inherent discretion to order an evidentiary hearing is an issue that is separate and distinct from whether a habeas petitioner is *entitled* to an evidentiary hearing. As Petitioner correctly points out, *Keeney* and *Mitchell* stand for the proposition that a:

> habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Mitchell, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12). Because the district court properly ordered an evidentiary hearing pursuant to its inherent authority to do so, the issue of whether Petitioner is entitled to an evidentiary hearing is irrelevant and will not be addressed.

Following the oral arguments in this case, the Supreme Court decided *Williams v. Taylor*, 120 S.Ct. 1479 (2000), in which it interpreted the fault requirement of a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). The specific provision that was at issue states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows [the existence of two limited exceptions]." 28 U.S.C. § 2254(e)(2). While the use of the word "shall" in this provision may evidence the Congressional intent to remove a district court's inherent discretion to order an evidentiary hearing in the absence of either of the provided exceptions, this provision does not apply to the instant appeal because Petitioner filed his habeas petition on the day before the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA only applies to petitions filed after the date of its enactment). While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law. *Williams* does not, therefore, lead to the conclusion that the district court erred below.

Additionally, although *Williams* characterized the *Keeney* decision as "requir[ing] the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim," *id.* at 1488, the use of the word "could" does not imply that if the district court ordered a hearing based upon its inherent discretion, it erred. Thus, the distinction between when a petitioner is entitled to a hearing, which was at issue in *Keeney*, versus whether a district court has the inherent discretion to order a hearing, is still intact following *Williams*.

3. Ineffective Assistance of Counsel

Recognizing that in a habeas case a district court has the inherent authority to order an evidentiary hearing to settle disputed issues of material fact obviously raises the issue of how any evidence received by the district court is to be considered if the court holds that the presumption of correctness under § 2254(d) applies. The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence. The Tennessee Court of Criminal Appeals affirmed that decision. *See Jones*, 1995 WL 75427, at *2. The State argues that in the absence of the evidence presented at the evidentiary hearing below, the state court findings of fact show deficient performance on the part of Petitioner's trial counsel, but do not show any prejudice from that deficient performance. Petitioner responds by arguing that the state court findings of fact do show that he was prejudiced by trial counsel's deficient performance.

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally,

> [w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence--would have

> concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. Finally, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Of course, as stated above, the prejudice prong of the *Strickland* test is a mixed question of law and fact that is reviewed de novo.[4] Nevertheless, the state court findings of fact should be accorded the presumption of correctness under § 2254(d). The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the factual findings set forth above in the process. Based upon these findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial. As the Supreme Court of the United States noted in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances

[4] Neither party argues that any error has ever been committed with respect to the performance prong of the *Strickland* test.

> outweighed the mitigating circumstances and, hence, the sentence imposed." Indeed proof of the appellant's psychological history in all probability would not have changed the result, especially in light of appellant's conviction of prior malicious killing while in a federal penitentiary and the other aggravating factors. A decision of counsel relating to a choice of trial or appellate strategy, even if it were proven improvident, could not form the basis for an ineffective assistance of counsel claim.

Jones, 1995 WL 75427, at *2.

Petitioner argues that this conclusion was in error, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), for the proposition that the capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." *Id.* Petitioner's reliance upon *Lockett* is misplaced as it involved the presentation of evidence of mitigating circumstances that was deemed not to fit within Ohio's narrow death penalty statute. *See id.* at 594-95. In the instance case, Petitioner did not "proffer" any evidence that the jury was precluded from considering.

Petitioner also relies upon *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), for the proposition that "[o]ur sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity." *Id.*

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. When a district court in a habeas case orders an evidentiary hearing to settle disputed issues of material fact pursuant to its inherent authority to do so, that evidence could be offered for a variety of purposes, though the most common presumably would be to rebut the presumption of correctness accorded to state court findings of fact. *See Groseclose v.*

Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997) (stating that "federal courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence."). However, in the instant case, the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. *Compare Abdur'Rahman*, 999 F.Supp. at 1093, *with id.* at 1094-1102. Instead, the additional evidence seems to merely supplement the factual findings made by the post-conviction trial court. *See Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (allowing evidence obtained at an evidentiary hearing to supplement the trial transcript and record).

Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

On cross-appeal, Petitioner argues that the "heinous, atrocious, or cruel" aggravating circumstance instruction that was given to the sentencing jury was unconstitutionally vague and overbroad, relying upon *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). The district court concluded that even if the

instruction was vague, any error caused thereby was cured by the Tennessee Supreme Court's application of a constitutional narrowing construction to the aggravating circumstance. The State argues that if the instruction was unconstitutionally vague, any error was harmless due to the jury's finding of other aggravating circumstances.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court addressed the vagueness of a similar instruction and set forth the following standard to employ:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id. at 361-62 (citations partially omitted).

> The death penalty instruction in the instant case stated:
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
> * * * * * *

> (2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;
> * * * * * *
> In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful--causing suffering--excuse me--painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

Abdur'Rahman, 990 F.Supp. at 987.

In *Maynard*, the Court held that an instruction including as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, though the Court left open the possibility that certain limiting constructions of that instruction would be constitutionally acceptable. *Id.* at 364-65. Additionally, it noted that "some kind of torture or serious physical abuse" limiting instruction may pass constitutional muster. *See id.* Following *Maynard*, this court held unconstitutionally vague an instruction stating a specified statutory aggravating circumstance as: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Houston*, 50 F.3d at 387.

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "[W]henever an aggravating factor has been invalidated in a weighing state,[5] the sentence must be

[5] "Tennessee is a 'weighing' state—that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed." *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995).

reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334. The *Coe* court went on to state that:

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis—how the aggravating and mitigating circumstances balanced—would have reached the same result even without the invalid factor.
>
> . . .
>
> [I]t is only when the "death sentence has been infected by a constitutionally . . . invalid aggravating factor" that state reweighing is required to preserve the verdict. By definition, though, an error that is harmless does not "infect" the sentence and does not require reweighing by the state.
>
> . . .
>
> We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. *See State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d). *See Sumner*, 449 U.S. at 546 (stating that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court."). Additionally, Petitioner has neither offered any argument as to why this presumption should not apply, nor any evidence that the jury did not find the three aggravating circumstances.

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. *See State v. Jones*, 789 S.W.2d at 550 (stating that "[t]here is no doubt that the evidence in this case was sufficient to support each of the aggravating circumstances found by the jury."). As quoted above, the *Coe* court found that removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors. *See Coe*, 161 F.3d at 334. However, in the instant case, as the district court found, "[t]his is a case of no mitigating evidence--none--being offered to the jury despite its availability and abundance." *Abdur'Rahman*, 999 F.Supp. at 1101. Thus, even if the heinous, atrocious, or cruel aggravator is removed form the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

5. Petitioner's Unanimity Objection to the Sentencing Instructions

Petitioner argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstances and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Petitioner argues that the jury was repeatedly informed that their decisions had to be unanimous, but were not instructed that

[6] This conclusion is not affected by our holding that the district court properly considered the evidence it obtained during the evidentiary hearing because although that evidence contained mitigating circumstances that could have been offered at the sentencing stage, Petitioner does not argue that a re-weighing is necessary on this basis. Thus, in terms of possible re-weighing, we look only to the evidence presented at the sentencing stage.

they did not have to be unanimous as to mitigating circumstances. The district court held that "there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. . . . [t]his Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case." *Abdur'Rahman*, 990 F.Supp. at 994. This holding was correct.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that sentencing instructions that create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. *See id.* at 384. The standard for reviewing such a challenge to the jury instructions "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

In the instant case, the substantive portions of the trial court's instructions were:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * * * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * * * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved

> by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:
>
> Punishment of Death
>
> End quote.
>
> The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.
>
> If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

Abdur'Rahman, 990 F.Supp. at 993. Additionally, at the end of the instructions the trial court stated that "[t]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." *Id.* at 993-94.

Coe is dispositive of this issue. In *Coe*, the jury was similarly told that to impose the death sentence its verdict must be unanimous. *See Coe*, 161 F.3d at 337. This court held:

> We find that the instructions challenged by Coe do not violate Mills. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could

> reasonably be taken to require unanimity as to the presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a unanimous verdict, each juror must conclude that the mitigators do not outweigh the aggravators.

Coe, 161 F.3d at 338. The same can be said of the instructions in the instant case. No statement therein can be said to require unanimity as to the presence of a mitigating factor. Indeed, Petitioner merely argues that the proximity of the terms "unanimous" and "mitigating circumstances" could have led the jury to misinterpret their obligation. This is not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[7]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation,[8] prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual conflict of interest and that Petitioner suffered no prejudice

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[7] Additionally, as the district court found, there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor.

[8] Petitioner argues that he is entitled to habeas relief on his conviction due to his trial counsel's inadequate performance without having to show prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), and *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). However, Petitioner points to no facts supporting a claim of wholly inadequate representation.

because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

The prejudice prong of *Strickland* relating to ineffectiveness of counsel at the guilt phase asks "the question . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. As stated above, the prejudice prong of *Strickland* is a mixed question of law and fact subject to de novo review. *See id.* at 698. Petitioner's claims must be evaluated keeping in mind the compelling incriminating testimony of both Miller and Norman. Additionally, Petitioner confessed to the crime at the sentencing stage. *See Abdur'Rahman*, 990 F.Supp at 1086.

1. Conflict of Interest

Petitioner argues that he need not show any prejudice as defined by *Strickland* because under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain [habeas] relief." *Id.* at 349-50. Petitioner argues that the third-party fee arrangement created a conflict of interest for his trial counsel because Boyd, the source of payment, was involved in the crime due to having allegedly supplied the shotgun used by Petitioner. However, the next sentence in *Cuyler* is dispositive of Petitioner's claim. *Cuyler* strictly requires that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a conviction." *Id.* at 350.

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee. Though Petitioner argues that he was adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were

adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F.Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

Petitioner's reliance upon *Wood v. Georgia*, 450 U.S. 261 (1981), is misplaced. *Wood* involved an Equal Protection challenge to the imprisonment of three probationers because of their inability to make installment payments on fines. The Court did not resolve this issue because it remanded for a determination of whether a conflict of interest existed within a third-party payor arrangement. The probationers were three employees of an adult movie theater and bookstore who had been convicted of distributing obscene materials. As pointed out by Petitioner, the Court noted that "'[a] conflict of interest inheres in every such situation [a criminal defendant being represented by a lawyer hired and paid by a third party] . . . It is inherently wrong to represent both the employer and the employee . . . it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *Id.* at 271 n.15.

Unlike the instant case, in *Wood* the attorney was representing both the employer and the employees: "[s]ince it was this decision [not to pay the fines] by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident." *Id.* at 267. Additionally, the statement from *Wood* upon which Petitioner so heavily relies was contained in a footnote to that opinion and was not the basis of the Court's decision to remand for an evidentiary hearing to determine whether a conflict of interest existed. Instead, the Court stated that "[o]n the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him."

Id. at 272. In the instant appeal, the record below does not compel the same conclusion. Given the district court's conclusion that Barrett did not protect the interests of Boyd or the SEGM, Petitioner cannot show that Barrett was actively representing conflicting interests and that he is therefore not entitled to a presumption of prejudice at the guilt stage.

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. *See Abdur'Rahman*, 999 F.Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle

Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. A review of this MTMHI document shows that it would be compelling evidence against any insanity defense. Thus, Petitioner cannot show that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt if his trial counsel had investigated and presented evidence of his mental history.

The district court did not err in concluding that Petitioner suffered no prejudice at the guilt stage due to his counsel's deficient performance.

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. The habeas court in this case believed that it had essentially unlimited discretion to conduct an evidentiary hearing on the petitioner's ineffective assistance of counsel claim. Such discretion is, however, an artifact of a bygone era. As this court recognized in *Mitchell v. Rees*, the modern Supreme Court has substantially pared back the ability of federal courts to retry cases already tried in the state courts. I would therefore hold that the district court in this case improvidently granted the petitioner an evidentiary hearing. I concur in all other parts of Judge Siler's opinion.

I

In 1963, the Supreme Court invested federal habeas courts with broad discretion in most aspects of collateral review of state criminal judgments. Contending that the common law conceived of the Great Writ as a remedy available for any kind of governmental detention contrary to fundamental law, the Court in *Fay v. Noia* declared that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in . . . state court proceedings." *Fay*, 372 U.S.

391, 426 (1963). This broad conception led the Court to hold that even a petitioner who had procedurally defaulted his claims in state court could obtain habeas relief, subject to the district court's "discretion" to deny relief when the orderly procedure of the state courts had been deliberately bypassed. *Id.* at 434, 438. In parallel fashion, the Court empowered federal habeas courts to conduct evidentiary hearings even when a petitioner had failed to develop the facts in state court proceedings. "In every case," the Supreme Court wrote in *Townsend v. Sain*, the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Townsend*, 372 U.S. 293, 318 (1963). *Townsend* limited the discretion of habeas courts in this regard only by requiring that evidentiary hearings be held under six circumstances that would call into question the integrity of state court factfinding. *Id.* at 313.

The generation following *Fay* and *Townsend* has witnessed a sea-change in the law of habeas corpus. This change has been spurred by an increased attentiveness to considerations of comity and the values of "our federal system." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The idealistic predictions of *Fay* and *Townsend* that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not employ their discretion to subvert the integrity of state criminal justice, had been proven wrong. *Townsend*, 372 U.S. at 318; *see also Fay*, 372 U.S. at 433 (suggesting that the plenary power of inquiry on federal habeas corpus would not create incentives for defendants to withhold claims in state proceedings). The law reviews and the popular press echoed with calls for the unelected federal judiciary to desist from frustrating the outcomes of democratic process, particularly in capital cases. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L.Rev 333 (1998) (tracing the history of the countermajoritarian difficulty); *see also* Thomas Goldsmith, *Activists Want Nixon Impeached: Group Takes Message to Centennial Park*, The Tennessean, Mar. 26, 2000, at 1B (noting current calls for the impeachment of a

federal district court judge on the ground that his personal bias against the death penalty makes him unfit to hear cases in which it is a factor). *Fay* was overruled. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Recognizing that in a federal system, the States should have the first opportunity to address and correct violations of state prisoners' federal rights, and that *Fay* had undervalued the important interests served by state procedural rules, the Supreme Court replaced *Fay*'s "deliberate bypass" standard with a cause-and-prejudice inquiry. *Coleman*, 501 U.S. at 731, 750. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is *barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750 (emphasis supplied). In view of the significant harm suffered by States when federal courts failed to respect state procedural rules, federal court "discretion" to consider a habeas petitioner's federal claims was inappropriate when the petitioner had deprived the state courts of an opportunity to address those claims in the first instance.

Townsend's holding with respect to evidentiary hearings, too, was overruled. Just as a district court had no discretion to consider federal claims that a habeas petitioner had not submitted to the state courts, neither could it have discretion to allow a petitioner to develop facts that had not been fairly presented to the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (stating that it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). Thus, in *Keeney v. Tamayo-Reyes*, the Supreme Court applied the cause-and-prejudice standard to determine whether a state prisoner who had failed to develop material facts in state court was entitled to an evidentiary hearing on habeas corpus. *Id.* at 11.

Keeney was a case in which a petitioner sought a federal evidentiary hearing but did not receive one. *See id.* at 4.

Taking his cue from this fact, Judge Siler interprets *Keeney* to mean that a showing of cause and prejudice *requires* a habeas court to conduct an evidentiary hearing, but that even in the absence of such a showing, the court retains discretion to hold a hearing. *See ante* at __. In my view, neither the language nor the reasoning of *Keeney* will support this interpretation. In addition, the Supreme Court's recent pronouncements in *Williams v. Taylor*, 120 S. Ct. 1479 (2000), strongly corroborate a reading of *Keeney* that limits the authority of habeas courts to order evidentiary hearings.

The *Keeney* Court granted certiorari to decide "the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Ultimately, the Court determined that "the 'cause-and-prejudice' standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power." *Id.* at 7. As a purely textual matter, nothing in the Court's framing of the question, or in its resolution of that question, suggests that the Court was restricting its holding to those circumstances in which a habeas petitioner is "entitled" to an evidentiary hearing.

More importantly, the logic that the Court followed to arrive at the cause-and-prejudice standard will not admit of such a construction. The Court based its holding on a quintet of values embedded in our federal system: comity, finality, judicial economy, channeling of claims to the appropriate forum, and uniformity in the law of habeas corpus. *Id.* at 8-10. It is difficult to understand how any of these values would be served by a system that entitled state prisoners to evidentiary hearings only upon a showing of cause and prejudice, but nevertheless invested the habeas courts with bottomless discretion to order hearings where they are not required. Such a system still would deny the States the opportunity to correct their own constitutional errors, would multiply the opportunities to relitigate convictions, and would consume scarce judicial resources.

Of particular concern is the disruption to the values of proper forum allocation and uniformity that would attend survival of the *Townsend* doctrine. The Supreme Court likened the former value to the requirement of exhaustion,

noting: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10. A doctrine that allows a habeas court to conduct an evidentiary hearing where the petitioner has, without cause, failed to develop facts in state court re-engineers this two-way street into a blind alley. Even though the state court is the appropriate forum for resolution of factual questions in the first instance, *Townsend* creates "incentives for the deferral of factfinding to later federal court proceedings"—which can only "degrade the accuracy and efficiency of judicial proceedings." *Id.* at 9.

Similarly, the *Keeney* Court rested its holding on a symmetry between the jurisprudence of procedural default and that governing factfinding in the habeas courts. "There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated," wrote the Court. "And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. A dogged fidelity to *Townsend* disrupts this symmetry. Absent a showing of cause and prejudice, a habeas court would have no discretion to entertain a claim that had been procedurally defaulted in state court, but would have discretion to conduct an evidentiary hearing on a claim raised but insufficiently developed in state court, even where the petitioner did not show cause and prejudice for his failure to develop the factual record in the state court. Given the importance that the *Keeney* Court ascribed to uniformity in the law of habeas corpus, that cannot be a correct reading of the case.

This Court has recognized that *Keeney* implicitly withdrew the discretion that *Townsend* had granted. In *Mitchell v. Rees*,[1] we reversed a district court for ordering an

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[1]To the extent that *Mitchell* suggested that a district court is without authority to hold an evidentiary hearing without first finding that one of the factors listed in 28 U.S.C. § 2254(d) applies, I agree with Judge Siler that its statement is "overbroad". *See Keeney*, 504 U.S. at 1720 n.5 (noting that § 2254(d) "indicates no

evidentiary hearing on a habeas petitioner's *Batson* challenge without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice. *Mitchell*, 114 F.3d 571, 579 (6th Cir. 1997). "[A] district court abuses its discretion," we said, "by ordering such a hearing without first requiring the petitioner to make the requisite showing." *Id.* at 577. We have been joined in this understanding by at least one other Circuit. *See Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992).

Our understanding is buttressed by a case decided by the Supreme Court just this Term, *Williams v. Taylor*. In *Williams*, the Court interpreted 28 U.S.C. § 2254(e)(2), a statute enacted four years after the decision in *Keeney*. Section 2254(e)(2) provides: "If the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant" satisfies certain conditions. 28 U.S.C. § 2254(e)(2) (emphasis supplied). In deciding the level of fault connoted by the term "fail", the Court determined that the opening clause of § 2254(e)(2) is essentially a codification of the holding in *Keeney*: "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 120 S.Ct. at 1489. As this language suggests, the Supreme Court itself does not read *Keeney* as deciding when a petitioner is *entitled* to an evidentiary hearing; rather, the case sets forth what a petitioner must do in order to obtain one. *See also id.* at 1488 ("We required the prisoner [in *Keeney*] to demonstrate cause and prejudice excusing the default before he *could* receive a hearing on his claim . . . ." (emphasis supplied)).

Keeney, *Mitchell*, and *Williams* thus command that a petitioner who has not developed facts in state court must

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assumption that the presence or absence of any of the statutory exception will determine whether a hearing is held").

justify his failure to do so through a showing of cause and prejudice before he may present those facts to a federal habeas court.

II

In Tennessee's post-conviction courts, petitioner Abdur'Rahman claimed that his trial counsel had rendered ineffective assistance by failing to investigate his mental health and criminal histories sufficiently to paint a sympathetic picture of his abusive childhood and resulting serious mental illness at sentencing. The state court conducted an evidentiary hearing, at which it considered the testimony of one Dr. Barry Nurcombe; Abdur'Rahman's school, military, and prison records; the transcript of a previous trial; records of the Middle Tennessee Mental Health Institute; records of social services departments; the affidavit of Mark Jones, Abdur'Rahman's brother; and a great deal of other evidence. At the conclusion of the hearing, the court held that Abdur'Rahman's trial counsel had been constitutionally deficient—reasonable attorneys would have investigated the accused's mental health and criminal histories. The court concluded, however, that counsel's faulty performance did not prejudice Abdur'Rahman. The evidence introduced at the hearing, the court noted, contained extensive documentation that Abdur'Rahman had had a past of profound violence, but no serious mental illness. Deciding that this information "looks like a mine field for any trial attorney to tiptoe through," the court denied post-conviction relief.

In his petition for federal habeas relief, Abdur'Rahman renewed his contention that trial counsels' deficient performance at sentencing had resulted in prejudice. Over the State's objection, the district court conducted an evidentiary hearing on the ineffective assistance claim. Although the State confronted the district court with *Mitchell*, the court cited an unpublished district court order for the proposition that the granting of an evidentiary hearing is discretionary. The district court proceeded to consider a significant volume of evidence, including the testimony of seven live witnesses, that was not presented to the state courts. Largely on the basis of this evidence, the district court concluded that

Abdur'Rahman had been prejudiced because his trial attorneys could have shown such mitigating circumstances as childhood abuse, serious mental illness, and the defendant's good qualities.

In doing so, the district court erred. Upon authority of *Keeney* and *Mitchell*, the district court could not order an evidentiary hearing until Abdur'Rahman showed cause for his failure to develop the factual record fully in the state courts. Ordinarily we would vacate the order partially granting the writ of habeas corpus and the order for the evidentiary hearing, *Mitchell*, 114 F.3d at 579, and remand the matter to the district court to afford Abdur'Rahman the opportunity to bring forward evidence establishing cause and prejudice, *Kenney v. Tamayo-Reyes*, 504 U.S. at 11. In this case, however, such a disposition is unnecessary; the evidence that Abdur'Rahman adduced at the federal evidentiary hearing is plainly insufficient to undermine confidence in the jury's sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Siler points out, the additional evidence presented to the habeas court merely supplemented the factual findings made by the post-conviction trial court. What the state court said in 1995 holds true today: "It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances including the heinousness of the killing." I therefore concur that the order granting the writ as to Abdur'Rahman's death sentence should be reversed.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part, dissenting in part. Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

As an initial matter, I agree with Judge Siler that the district court properly ordered an evidentiary hearing, under its discretion to do so, and properly considered the evidence presented at this hearing. I also note that the concurrence's

invocation of the bugaboo of overreaching federal courts does not reflect the reality of federal habeas review. *See* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 482 (1990) (reporting that, in 1987 and 1988, only 1.1% of habeas corpus petitioners received a full hearing at the district court).

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As noted by the majority, we review this mixed question of law and fact de novo. *See id.* at 698; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination. I survey counsel's deficiencies here because I believe that they help illuminate why Abdur'Rahman's sentence of death "resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Counsel's performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate. "[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that defense counsel was obligated to investigate mitigating

mental health evidence for sentencing). Counsel failed to ask the trial court to declare Abdur'Rahman[1] indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.

The majority suggests that, armed with this evidence, defense counsel could have made a legitimate tactical decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. *See id.* at 693-94. Instead, "[w]hen a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the

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[1]I use Abdur'Rahman's present name throughout when referring to him, even in the context of events that occurred or documents created when the petitioner went by the name of Jones.

errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original)).

Although the jury found three aggravating factors at sentencing, it had nothing to weigh this information against; it is unsurprising that comparing those three factors with the dearth of mitigating evidence that the jury chose to impose a death sentence on Abdur'Rahman. However, "[t]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The jury's failure to consider mitigating evidence "risks erroneous imposition of the death sentence." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (quoting *Eddings v. Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

Unbeknownst to the jury determining Abdur'Rahman's fate, mitigating evidence existed and was available for presentation at his sentencing hearing. If counsel had performed adequately, the jury could have learned that that Abdur' Rahman has a history of traumatic abuse as a child, that he had a long history of mental health problems and

treatments, and, finally, that Abdur'Rahman had previously been a productive member of society.

The abuse suffered as a child by Abdur'Rahman, mostly at the hands of his father, a military policeman, was inhumane and shocking.[2] Dr. Raymond Winbush, who testified before the district court, stated that Abdur'Rahman's "is singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read."

This abuse was attested to by the petitioner, the petitioner's half-sister, who was not contacted by counsel but

[2] As the district court stated:

> During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.
>
> Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.
>
> Petitioner's statements to mental health providers [over the course of his life] provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury.

Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (footnote and citations to record omitted).

was available to testify, and the petitioner's brother, Mark Jones, who likewise was not contacted by counsel but stated in an affidavit that he would have been willing to testify at trial.[3] This abuse, while not a justification for petitioner's criminal conduct, is relevant, mitigating evidence that should have been presented to the jury.

Abdur'Rahman had a persistent history of psychiatric disorders and mental health problems. A "defendant[] who commit[s] criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The mental health of the defendant has consistently been determined to be relevant, probative information to which the jury is entitled when making a life or death decision. *See, e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (finding that the petitioner was prejudiced by counsel's failure to investigate and present mitigating evidence at sentencing); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). The jury, however, heard nothing at sentencing regarding Abdur'Rahman's mental health history.

In the record before us, we have the testimony of Dr. Samuel Craddock, who was part of the team that diagnosed Abdur'Rahman for the state of Tennessee for purposes of competency to stand trial and a potential insanity defense without knowledge of his history of mental illness. Craddock testified that Thorazine and Prolixin, the medications prescribed for Abdur'Rahman in prison, were powerful anti-psychotic medications which raised a question of whether he was mentally ill, and that the symptoms exhibited by Abdur'Rahman were like those of someone with a borderline personality disorder. Dr. Diana McCoy testified that she diagnosed Abdur'Rahman with post-tramatic stress disorder and a possible borderline personality disorder. Dr. Robert Sadoff offered a similar diagnosis as McCoy.

Included in the records before this court are a department of social services report from the state of Washington stating

[3] Petitioner's brother subsequently committed suicide.

that Abdur'Rahman had a "paranoid personality" and "personality pattern disorder;" Philadelphia school records which include a request for psychiatric services; and prison records, including psychiatric examinations, some which state that Abdur'Rahman does not have a mental illness or psychosis, but does have a history of documented suicide attempts, and some which indicate that Abdur'Rahman was diagnosed with other disorders, including a severe psychopathic personality and a "psychotic depressive reaction and antisocial personality." Abdur'Rahman's prison records also indicate that Abdur'Rahman was frequently and heavily medicated during at least some of his time in prison and that he beat his head against the wall while in prison. Records from the New Jersey Department of Human Services document his 1967 stay while a youth at the Trenton Psychiatric Hospital, where he was diagnosed with a sociopathic personality disturbance and antisocial reaction with depression, and records from the Davidson County Sheriff's Department show that Abdur'Rahman beat his head against a wall after his arrest there. Further, the record indicates that others in Abdur'Rahman's family had mental health problems. Many of these records were available to defense counsel through the MTMHI report, prepared for the purpose of determining Abdur'Rahman's competence to stand trial;[4] however, counsel failed to investigate or present any of this mitigating information to the jury. Nor did counsel present to the jury a mental health expert who could have testified regarding Abdur'Rahman's mental health problems.

Further, testimony from the trial of Abdur'Rahman's conviction for second-degree murder for the killing of a fellow inmate – a conviction that supported one of the aggravating circumstances – indicated, in the opinion of one expert, that Abdur'Rahman had a borderline personality disorder and schizoid personality. This evidence could have

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[4]The fact that Abdur'Rahman was found competent to stand trial does not, of course, alter the fact that his mental health problems should be considered by the jury at sentencing. *See Blano v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

been mitigating with respect to the petitioner's mental health, as well as with respect to the prior murder.

Abdur'Rahman's wife could have her personal observations about his mental health, including the fact that her husband had conversations with people who did not exist, banged his head against the wall, and believed that the couple would give birth to the next Messiah. She also stated that she told defense counsel that a psychiatrist should examine her husband.

Despite his childhood abuse and extensive mental health history, Abdur'Rahman was able to comport his conduct to societal norms and to engage in productive activities. His former fiancé, about whom he informed defense counsel, but whom counsel failed to contact, later testified that, when she knew him in 1983, Abdur'Rahman held a steady job, attended college, and volunteered with a Quaker youth group at a large housing project. She stated that the petitioner was a caring and gentle person who sincerely held Christian beliefs.

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing – the very purpose of a capital sentencing hearing. In addition, the majority ignores the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or

harmful behavior by Abdur'Rahman. *See Williams v. Taylor*, 120 S. Ct. 1495, 1514 (2000) (noting that the presence of unfavorable records did not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [petitioner's] favor").

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Austin*, 126 F.3d at 848; *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

ORDER

Petitioner, Abu-Ali Abdur' Rahman, has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth in the accompanying Memorandum, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. Petitioner shall remain incarcerated as described in the Memorandum.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380

JUDGE CAMPBELL

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur' Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate and inform the jury about Petitioner's unstable mental history and bizarre family background. The

[1]Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur'Rahman.

jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14)[2].

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp

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[2]The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which Petitioner was on parole when he was convicted of the state offenses. *Id.*

withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. *Id.* The Tennessee Court of Criminal Appeals[3] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Jones v. State*, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.
>
> > The victim in this case was bound, gagged, and blind folded with duct tape. He was distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six

[3]The panel consisted of only two judges, rather than the usual three judges.

> (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> *State v. Jones*, *supra*, at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(l), (4), (C8)) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the *Batson* challenge (Amended Petition, at ¶C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶C2(5)); sufficiency of evidence of robbery and first degree murder (¶C3); inadequate proportionality review (¶C9); prosecutor's questions during guilt phase (¶D4); prosecutorial misconduct involving publication of indictments to jury (¶D6); cross examination of Petitioner at sentencing (¶D7); and State's argument at sentencing regarding the Southeastern Gospel Ministry (¶D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. *Id.* The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

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[4]Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. *Id.* As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. *Id.* A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly presen[t]" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. *Picard v. Conno*, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. *Gray*, 116 S.Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. *Gray*, 116 S.Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent

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[5]Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶C I); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility ¶2(l)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both ¶C4(l)); whether voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶C4(5); ¶C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶C7(2), ¶C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶C7(5)); whether

duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court. The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death

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the sentencing instructions as a whole were unconstitutional (¶C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶C 10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶D8(l)-(3),(5)-(8)).

sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, *see Dolny v. Erickson*, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement. *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review, (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

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[6]Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

[7]Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, ¶C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶C 10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process of Laws, Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I. Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is

Disproportionate To The Sentence Imposed In Similar Cases

> In addition to the arguments set forth in Section II A, B, C and D, *supra*, defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n. 11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's

constitutional rights (Amended Petition, (¶D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[8]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D 1(2)-(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For Permission To Appeal, at 9 (Addendum

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[8]These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶D 1(5)), the redacted portion of Detective Garafola's Report (¶D1(6)), other police reports (¶D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶D1(9)), the statement of George Daniels/laboratory reports (¶¶D1(10)(I 1)), and information regarding Petitioner's bank account (¶D1(12)). These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's t stimony (¶D2(l)); whether the prosecution provided false inform..tion to MTMHI¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶D3(l)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶D8(l)-(3),(5)-(8)).

15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶D2(2)). Petitioner argues that he raised this claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the prosecution made a misleading closing argument. *Id.* Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the claim that defense counsel conducted a deficient investigation of Petitioner's mental history (Amended Petition, ¶¶E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that

defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. *Jones v. State*, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1)(7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. *See* Tenn. Code Ann. §

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[9]For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶A).

[10]Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

40-30-202.[11] Thus, because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted. *See Hannah v. Conley*, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrie*, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's

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[11]Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, *et seq.* With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken. The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102, 30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

[12]Petitioner also argues that certain state procedural rules should not prevent adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. *See Teague*, 109 S.Ct. at 1069; *Coleman v. Thompson*, 111 S.Ct. at 2557 n.1.

incompetence rises to the level of a constitutional violation. 106 S.Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some interference by officials'" made compliance with the procedural rule impracticable. *Murray*, 106 S.Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. *Murray*, 106 S.Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (*See* Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective assistance of counsel regarding those proceedings. *Coleman*, 111 S.Ct. at 2566.[14]

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[13]In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983).

[14]Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel." (Petitioner's Response To Motion To Compel Disclosure

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. *Murray*, 106 S.Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2521-22, 120 L.Ed.2d 269(1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 115 S.Ct. at 867 (quoting *Murray v. Carrie*, 106 S.Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the

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Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

new evidence." *Id.* This standard requires "a stronger showing than that needed to establish prejudice." *Id.* (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 115 S.Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. *Sawyer,* 112 S.Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, *e.g.*, aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. *Sawyer*, 112 S.Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of

[15]Although he mentions it in his brief, Petitioner does not appear to have asserted a freestanding actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that set forth in *Schlup*. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. *Schlup*, 115 S.Ct. at 860-62; *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997).

Dr. Kris Sperry, a forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

Moreover, both Dr. Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel

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[16]Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum 1, at 1454-1455).

> Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. See also Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript at 523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. *Id.*

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the *Schlup* actual innocence standard. First, Dr. Sadoff's diagnosis comes almost twelve years after the crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity

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[17]This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. *See eg., State v. Clayton*, 656 S.W.2d 344, 346 (Tenn.1983).

defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. *Id.* Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff s opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the stabbings. (Transcript at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript at 210-212). That story turned out to be false. *Id.* Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly admitted his guilt at that time. (Addendum 1, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

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[18]These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by *Schlup*, 115 S.Ct. at 865. *See also McCoy v. Norris*, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. *See Sawyer,* 112 S.Ct. at 2524 (evidence "brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the *Schlup* Court has pointed out that the standard for establishing actual innocence

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During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. *Id.*

of the death penalty, set forth in *Sawyer*, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶D 1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶A, E 1-132(g)).

V. The Trial Court's Instructions Regarding the "Heinous, Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶C7(l), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's *Brady*[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D 1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the

[19]*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D 1 (7)).

In a series of cases beginning with *Brady v. Maryland*, 83 S.Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Suppression of this evidence violates due process if the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. *Id.*

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 105 S.Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. 105 S.Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S.Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S.Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S.Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S.Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct because the state failed to provide him with exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a violation of Brady, appellant must prove (1) the prosecutor suppressed evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.
>
> The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a *Brady* due process rights violation has occurred presents a mixed question of law and fact which is reviewed de novo. *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1977); *Reese v. Delo*, 94 F.3d 1177, 1183 (8th Cir. 1996); *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48).

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[20]Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

He testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing

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[21]During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

(Transcript at 1015-16).

As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. *Id.*

(Transcript at 959-60, 963), and Dr. Masri's testimony supported that defense. The Court is not persuaded, however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHl before trial, and conversations with Petitioner's wife. There is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone, the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the

defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the Court concludes Petitioner's *Brady* claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's *Brady* claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ El).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. *Id.* Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest

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[22]$5,000 was inadequate to investigate and prepare this complex case for trial.

affected his lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. *Mays*, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. *Jones v. State,* 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript at 294, 410). Ms. Mann, on the other hand, was more tentative:

> Q. Did you tell him where the money came from?
>
> A. I don't remember that. I don't know if I told him or not. I probably did. I don't know.
>
> Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?
>
> A. Probably so.
>
> Q. Can you testify to that today?
>
> A. That I told him?
>
> Q. Yes. A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the

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[23]To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. *See, e.g, Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); *Wilson v. Rogers*, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. Oct. 3, 1997).

source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In

[24]According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum II at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.
>
> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S.Ct. at 2064. The petitioner must show that trial counsel's performance, fell below an objective

standard of reasonableness, measured by "prevailing professional norms." *Id.*

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. *Id.*

One of the duties of counsel is the duty to investigate his client's case. 104 S.Ct. at 2066. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S.Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S.Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. 104 S.Ct. at 2070; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir.1996).

(Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have

presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." *State v. Jones*, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr.Barry Nurcombe. *Id.*

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.

4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.

5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available

> information concerning petitioner's institutional records while in the federal prison system.
>
> 11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.
>
> 12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.
>
> 13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. *Id.*

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr. Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiancé Sarah Roberts Walton; co-defendant Miller's former

attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafala, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript at 695 723). Trial was set for July 6, 1987. (Transcript at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript at 240-242, 277, 279, 722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds

for investigative and expert services, he did not file the motion. This was a significant error. (Transcript at278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript at 280, 282, 352, 716717). These were substantial errors.

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; PC Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of trial. (Transcript at 832). Mr. Barrett did not contact Petitioner's former fiancé, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript at 356). These were significant mistakes.

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[25]The Motion was prepared three days after jury selection began. (Transcript at 727). A post-trial motion for indigent status was approved. (Transcript at 376; Petitioner's Exhibit 88).

[26]Mark Jones committed suicide on July 13, 1996. (Transcript at 793).

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions[27]. (Transcript at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

(Transcript at 394-395).[28]

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[27]Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

[28]Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient.

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
>
> * * *
>
> . . . [W]e didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript at 734, 741, 766).)

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues he was prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no

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> should move to have him psychiatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

Similarly, the Court is persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr. Sadoff's opinions that Petitioner was insane at the time of the offense comes some twelve years after the crime.

Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. *Buchanan v. Angelone*, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___ (1998); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. *Buchanan*, 118 S.Ct. at

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[29]Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Id.* Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Id.*

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received

> regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancé.[31]

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[30]Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the *Federal Rules of Evidence*. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 19.5, at 532 (2d ed. 1994).

[31]The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript at 1191-

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript at 786, 818, 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript at 786-787). Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr. (Transcript at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with

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1192; February 19, 1987 -- MTMHI Social History, Petitioner's Collective Exhibit 150).

[32]As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. *Id.*

bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. (Transcript at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHI's Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past. (Transcript

[33]Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

[34]The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiancé, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief (Transcript at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the life history and character of the Petitioner, good and bad, that was absent from any prior proceeding in

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[35]Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

[36]Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Campbell. (Transcript at 1195).

state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual conduct, and that Petitioner stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit 136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before,

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript at 731).[38]

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

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[38]Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life. And it was more than he could handle and that he just broke down.

(Transcript at 731).

[39]Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript at 724; 1248, 1250).

[40]Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven ... I was fascinated with James ... he was different, just different from any man I had ever

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing. That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above, Petitioner was convicted of the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

Petitioner has been diagnosed as having a sociopathic personality disturbance with anti-social reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -- Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 10 1; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prison, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collective Exhibit 6). Prison records would also show that Petitioner escaped shortly before his parole date in 1982, but was recaptured a few months later.

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met ... he wanted to do something for the world. I was intrigued by that." (Transcript at 1216).

(Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum 1, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their

own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledges that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

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[41]Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

[42]For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's *Brady* claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's *Brady* claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent to commit murder and armed robbery and shall remain incarcerated.

It is so ORDERED.

_____

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

SEALED ORDER

Pending before the Court is Respondent's Second Motion For Summary Judgment (Docket No. 85). For the reasons stated in the accompanying Memorandum, the Motion is GRANTED in part and DENIED in part.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

SEALED MEMORANDUM

Pending before the Court is Respondent's Second Motion For Summary Judgment (Docket No. 85). For the reasons set forth below, the Motion is GRANTED in part and DENIED in part.

The Standards for Considering Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at 2553. In order to create a genuine factual issue, the nonmoving party must show there is

sufficient evidence favoring the nonmoving party for the factfinder to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

In short, in responding to a motion for summary judgment, the nonmovant must "put up or shut up" on the issues raised in the motion. *Street v. J.C. Bradford*, 886 F.2d 1472, 1478 (6th Cir. 1989).

Presumption of Correctness of State Court Findings

Respondent contends that, in ruling on Petitioner's claims, the Court should presume the correctness of the state court's factual findings. 28 U.S.C. § 2254(d)[1] provides that in a federal habeas corpus proceeding brought by a state prisoner:

> . . . a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct*, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

The statute then lists eight exceptions: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state court's factfinding procedure was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked personal or subject matter jurisdiction; (5) the state failed to appoint counsel for an indigent defendant; (6) the defendant did not receive a full, fair and adequate hearing in the state court proceeding; (7) the defendant was otherwise denied due process of law; or (8) the federal court determines that the state court's factual determination is not fairly

[1] The 1996 amendments to 28 U.S.C. § 2254 do not apply to Petitioner's case, which was filed before the effective date of the amendments. *See Lindh v. Murphy*, 117 S.Ct. 2059 (1997).

supported by the record. *Id.* If a habeas petitioner is unable to establish one of these eight exceptions, he bears the burden of proving "by convincing evidence that the factual determination by the State court was erroneous." *Id.*

The presumption of correctness set forth in Subsection (d) applies to factual findings made by state appellate courts, as well as state trial courts. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981) ("*Sumner I*"). The presumption does not apply to legal conclusions made by the state court, or to mixed questions of law and fact. *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 1306-07, 71 L.Ed.2d 480 (1982) ("*Sumner II*"). Questions of fact that underlie an ultimate legal conclusion, however, are entitled to the presumption of correctness. *Id.*

When a federal court determines that state factual findings are not entitled to a presumption of correctness, it is required to explain that determination. *Sumner I*, 101 S.Ct. at 771.

Petitioner argues that the state court findings should not be presumed correct based on numerous grounds. First, Petitioner contends that state court findings should not be presumed correct because Tennessee has failed to qualify for the "opt-in" provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. Several courts have held, however, that Section 2254(d)'s presumption of correctness applies to the findings of a state court in a state that has not qualified under the AEDPA opt-in provisions. *See, e.g., Lucas v. Johnson*, 1998 WL 7245 (5th Cir. Jan. 9, 1998). There is no support in law or logic for Petitioner's argument that the AEDPA changes the presumption of correctness in a case in which the AEDPA does not apply.

Next, Petitioner argues that he was not provided a full and fair hearing by the state because his trial counsel was underpaid, had a conflict of interest, failed to request adequate funds for investigation and expert assistance, and failed to present a meaningful defense at the guilt or sentencing stage. Petitioner also argues that the prosecutor withheld exculpatory evidence and misled defense counsel, the court, and the jury.

The Court will consider these allegations as they relate to applying a presumption of correctness to the state court's findings during the trial and sentencing and on direct appeal.

Petitioner contends that the attorney who represented him on appeal and in the state post-conviction proceeding was inexperienced and underpaid. Petitioner also complains about the effectiveness of the other two attorneys appointed by the state trial court in the state post-conviction proceeding. Finally, Petitioner argues that the post-conviction judge was biased against the Petitioner, and that only two of the original three-judge appellate panel actually ruled on his post-conviction appeal.

Petitioner has dropped the post-conviction ineffective assistance of counsel claim as it relates to the presumption of correctness issue, and therefore, the Court need not address the allegations relating to post-conviction counsel. (*See* Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files (Docket No. 140, at 2). The Court will consider the other allegations as they relate to applying a presumption of correctness to the state court's findings during the post-conviction proceeding in the trial court and on appeal.

Batson Challenge

In his Petition, Petitioner claims that the prosecution used peremptory challenges to exclude African Americans from the jury in violation of his rights under the Fourteenth Amendment (Amended Petition, at ¶C2(2)). In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the Equal Protection Clause prohibits a prosecutor's use of peremptory challenges for racially discriminatory purposes, and set forth the procedure by which a defendant could seek to prove discrimination. First, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire. 106 S.Ct. at 1723. Once the defendant makes this prima facie showing, the burden shifts to the state to provide a neutral explanation for challenging black jurors. *Id.*

Although the explanation need not rise to the level of a challenge for cause, stating that those of the defendant's race will be partial to the defendant because of their shared race does not rebut the inference of discrimination. *Id.* An

inference of discrimination also is not rebutted by a good faith denial of a discriminatory motive. *Id.* The explanation need not be persuasive or even plausible, however, as long as it is not based on race. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). Once the prosecutor provides an explanation, the trial judge determines whether the defendant has carried his burden of proving purposeful discrimination. *Id.*

Petitioner presented the *Batson* issue to the Tennessee Supreme Court on direct appeal.

The court addressed the issue as follows:

> In the present case the defendant is black as were his victims. The prosecution exercised five peremptory challenges, three against prospective black jurors, two against prospective white jurors. Two blacks actually served as jurors, one as an alternate.
>
> The prosecutor responded for the record to defense counsel's challenge to the selection process. He explained that he had sought to include blacks because he felt they would understand the circumstances of the case. Of the three black jurors excused, he stated that prospective juror William Green 'gave us trouble' on several of his answers. He did not favor the death penalty and while qualified under *Wainwright v. Witt* he appeared hesitant on this issue. Green's position as an elder in the Church of Christ might also compromise his role as a juror because, the prosecutor believed, he would have to explain his decision if he voted for death to his congregation under practices of the denomination. Mr. Green also seemed to be reluctant to sit on the jury for religious reasons and his answers were ambiguous on whether his religious feelings were so strong they would affect his decision making.
>
> The prosecutor's explanation for excusing prospective juror Sharon Baker was based upon her views about the death penalty and her demeanor during voir dire. In respect to this latter factor, the prosecutor noted that she avoided eye contact with him as he questioned her and with other people. She

> appeared disinterested in the proceedings and read a book in the jury box when other jurors were listening to the questions that were asked. She was not communicative during her voir dire and gave 'short cryptic answers.' In reference to the death penalty she gave the impression she would only vote for the death penalty if the defendant would not serve a complete life term. She was also the only juror who referred to rendering a death sentence as a 'killing.' The prosecutor was of the opinion these feelings could be easily manipulated by defense counsel to assure she would not vote for a death penalty if chosen as a juror. The third juror challenged, Robert Thomas, appeared uneducated and lacking the communicative skills of the other jurors. However, the primary reason for excusing him as a juror was because he was a close friend of defense counsel from whom he had solicited money for the church he once pastored.
>
> The trial court held that the defendant had failed to make out a prima facie case. We agree. There was no pattern of strikes against black jurors. There was no indication of any discriminatory purpose in the strikes. The State offered neutral reasons for the exercise of its challenges. We find the issue to be without merit on each of the constitutional grounds raised by defendant.

State v. Jones,[2] 789 S.W.2d at 548-49.

As explained above, Petitioner argues that the Court should not presume the correctness of these findings because of the ineffectiveness of his trial and appellate counsel, and the alleged misconduct of the prosecution. Petitioner has not made any allegations, however, that the presentation and resolution of his *Batson* claim was affected by these alleged defects. Thus, the Court concludes that Petitioner received a full and fair hearing on this claim. The Court also concludes that the state court's findings are supported by the record and should be presumed correct. (Addendum I, at 213-28; Addendum I, at 3 85-401, 496-528; Addendum I, at 1227-1263).

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[2]Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur'Rahman.

To support his argument that the prosecutor's challenges were based on race, Petitioner has filed the deposition of Assistant District Attorney John Zimmerman, one of the prosecutors at Petitioner's trial. (Exhibit 3 (Docket No. 114)). In the deposition, Mr. Zimmerman states that in cases involving an African-American victim and an African-American defendant, he has struck white jurors in order to place African-American jurors on the panel. When asked if he had done so in Petitioner's case, he stated that he did not remember. When the questioner pointed out that this case involved a "black on black" crime, Mr. Zimmerman stated: "yes, I wanted black people on the jury." (Zimmerman deposition, at 405-06).[3]

If Mr. Zimmerman struck particular white jurors in Petitioner's case on the basis of their race, Petitioner's equal protection claim would probably have merit. *See Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (Criminal defendant may raise equal protection challenge to race-based exclusion of jurors even if excluded jurors do not share the same race with the defendant). But the Court does not view Mr. Zimmerman's testimony as proof that he exercised peremptory challenges against particular white jurors in Petitioner's case on the basis of race. Petitioner did not ask Mr. Zimmerman if there were particular white jurors he struck because of their race, nor has he otherwise identified any white jurors who were excluded for this reason. Under these circumstances, Petitioner has not demonstrated the existence of a genuine factual dispute regarding his *Batson* claim. Respondent is entitled to summary judgment on this claim.

Exclusion of Jurors Based on Religious Beliefs

Petitioner claims that the trial court excluded certain jurors based on their religious beliefs or their opposition to the death penalty (Amended Petition, at ¶C2(3),(4)). The Supreme Court has held that a juror may be removed for cause if that juror's opposition to the death penalty is so strong that it would prevent or substantially impair the

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[3]Earlier in his deposition, Mr. Zimmerman stated that he does not try to exclude jurors based on their skin color. (Zimmerman deposition, at 402).

performance of his or her duties as a juror. *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1760, 90 L.Ed.2d 137 (1986). If a juror who opposes the death penalty states that he or she can set aside those beliefs and follow the law as instructed, however, that person may not be excluded from serving as a juror. 106 S.Ct. at 1766. Questions concerning a juror's religious beliefs are proper if they are used to determine whether the person could perform his or her duties as a juror. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 2468-70, 91 L.Ed.2d 144 (1986).

The Tennessee Supreme Court made the following findings regarding this issue on direct appeal of Petitioner's case:

> Several prospective Jurors, Vivian Lankford, Sharon Woods, Doris Haley, Mary Majors and Sandra Smith stated on voir dire that they were unable to consider the death penalty as a possible punishment. Each of them, to one degree or another, assessed their reason to be associated with their religious beliefs. Jurors Velva Hereford and Christine Northcutt also assessed their predisposition against the death penalty to have some relationship with their religious teachings and belief. Challenges for cause to each of these jurors was sustained by the trial court. Defendant insists that the questions put to the prospective jurors clearly constituted a religious test within the meaning of the State and Federal Constitution. Defendant concedes the State has a right to jurors who can make the discretionary judgment entrusted to them by the State and can thus obey the oath taken as a juror.
>
> We have considered this record carefully and conclude that the response of this Court in *State v. Bobo*, 727 S.W.2d 945, 949 (Tenn. 1987), is pertinent to the issue raised here. In that case the Court said:
>
> ***
>
> . . .We have read the voir dire carefully and, while some jurors said their opposition to and inability to impose the death penalty, regardless of the evidence adduced, was based in whole or in part on religious

> grounds, those jurors were excused because their views on capital punishment rendered them unable to follow the law as given to them by the court and to perform their duties as jurors in accord with their oaths. That their views on capital punishment may have had a religious foundation does not necessarily transform the test mandated by the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), into religious tests for . . . [constitutional purposes].

State v. Jones, 789 S.W.2d at 547.

Petitioner has not made any allegations that the presentation and resolution of this claim in the state court was affected by the incompetence of counsel or prosecutorial misconduct. Thus, the Court concludes that Petitioner received a full and fair hearing on this claim. The Court also concludes that the state court's findings are supported by the record, and should be presumed correct. (Addendum I, at 165-180; 247-257; at 422-427; 445-458; 554-571; 636-647; 657-674).

Even if the Court did not presume the correctness of the state court findings, the Court reaches the same factual and legal conclusions as the state court. Respondent is entitled to summary judgment on this claim.

Failure to Exclude Certain Jurors for Cause

Petitioner claims that jurors Mary Hunter, George Harding and Billy Smith were not properly excluded for cause (Amended Petition, at ¶C2(5)). The Supreme Court has upheld the application of an Oklahoma law that required a defendant to exhaust all peremptory challenges before obtaining a reversal based on the trial court's failure to exclude a juror for cause. *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Tennessee also requires the exhaustion of peremptory challenges before the appellate court will consider whether a trial court erred in refusing to exclude a juror for cause. *See State v. Smith*, 893 S.W.2d 908, 915 (Tenn. 1994).

On direct appeal in this case, the Tennessee Supreme Court rejected Petitioner's claim by applying that law:

> Defendant says it was error to deny challenges for cause of prospective jurors and this action on the part of the trial court denied him a fair trial.
>
> There is no basis for this objection. In *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279, 101 L.Ed.2d 80 (1988) speaking in reference to Oklahoma law, the court had this to say:
>
> > It is long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.
>
> This rule has long prevailed in the State of Tennessee. *See Hale v. State*, 198 Tenn. 461, 281 S.W.2d 51, 56 (1955).
>
> *State v. Jones*, 789 S.W.2d at 549.

The state appellate court's implicit factual finding is that the Petitioner did not exercise his peremptory challenges against these jurors. Petitioner does not challenge that factual finding. In any event, Petitioner does not specify how the allegations of ineffective assistance of counsel and prosecutorial misconduct impeded his ability to obtain a full and fair hearing in the state court on this issue. Therefore, the Court will presume the correctness of the appellate court's implicit factual finding.

Even if the Court does not presume the correctness of the appellate court's finding, the record supports the trial court's determination that these jurors could be fair and impartial and could properly exercise their duties as jurors. (Addendum I, at 260-289, 601-630, 769-779, 1033-1054); *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 2891-92, 81 L.Ed.2d 847 (1984); *McQueen v. Scroggy*, 99 F.3d 1302, 1319-20 (6th Cir. 1996).

Respondent is entitled to summary judgment on this claim.

Sufficiency of Evidence of Robbery and First Degree Murder

Petitioner argues that there was insufficient evidence adduced at his trial to support his convictions for robbery, felony murder, and premeditated murder (Amended Petition, at ¶C3). In reviewing this claim, the Court must determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 278i, 2789, 61 L.Ed.2d 560 (1976).

At the time of Petitioner's trial, "robbery" was defined as "[t]he felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." Tenn. Code Ann. § 39-2-501. First degree murder was defined as "[e]very murder perpetrated by . . . willful, deliberate, malicious and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any . . . robbery." Tenn. Code Ann. § 39-2-202. A person committed "assault with intent to murder" by assaulting someone with intent to commit murder. Tenn. Code Ann. § 39-2-103.

At the trial in this case, Robert Jordan testified that he worked with the Petitioner, and when Petitioner asked where he could get marijuana, introduced him to one of the victims, Patrick Daniels. (Addendum I, at 1418-1426). He took the Petitioner to Mr. Daniels' apartment and introduced the Petitioner to Mr. Daniels. *Id.* Norma Norman, Patrick Daniels' girlfriend, testified that she lived with Mr. Daniels, and that the first time she met the Petitioner was the night before the stabbings. (Addendum I, at 1329). Ms. Norman testified that the Petitioner visited their apartment for a short time. (Addendum I, at 1330).

Ms. Norman testified that the next night, Petitioner and Harold Devalle Miller[4] arrived at the apartment, and shortly

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[4]Ms. Norman did not learn the names of the Petitioner and Mr. Miller until some time after the stabbings. (Addendum I at 1343-1344).

after their arrival, Petitioner pulled a shotgun from underneath his coat, and Mr. Miller pulled out a revolver. (Addendum I at 1342-1359). The Petitioner then taped their feet and hands, and eventually, their mouth and eyes with duct tape. (Addendum I, at 1364-1365, 1370). Ms. Norman said that after her eyes were taped, she heard Mr. Daniels grunt, and she thought she heard a "gush of blood." (Addendum I, at 1375-1376). Ms. Norman then felt two blows to her back, though she didn't know she had been stabbed. (Addendum I, at 1377). The next thing Ms. Norman heard was what she assumed to be the Petitioner and Mr. Miller going out the back door. (Addendum I, at 1378).

Ms. Norman identified the Petitioner and Mr. Miller from a photo line-up, and identified the Petitioner again at trial. (Addendum I, at 1399-1403).

Harold Devalle Miller testified that he met the Petitioner through work at the National Baptist Publishing Board. (Addendum I, at 1441). He said that on the day before the stabbings, the Petitioner told him that he and Robert Jordan were going to buy some marijuana (Addendum I at 1446-1448). When the Petitioner returned, he told Mr. Miller that the man he bought the marijuana from had "some good weed," and that he was "a little punk" and "we could probably go gangster him." (Addendum I, at 1450). Mr. Miller testified that "gangster him" meant to rob him. (*Id.*)

Mr. Miller said they planned to go back to Mr. Daniels' apartment, and that while Petitioner was in the apartment, Mr. Miller was supposed to come in with Petitioner's sawed-off shotgun, rob Mr. Daniels and pretend to rob the Petitioner. (Addendum I, at 1450-1451). Mr. Miller testified that the Petitioner went into Mr. Daniels' apartment as planned, but that he got scared and ran away. (Addendum I, at 1453-1456). When the Petitioner returned, he told Mr. Miller he had set up another buy for the next night. (Addendum I at 1457-1458).

The Petitioner had dinner at Mr. Miller's the next evening, and the two of them discussed their plan to rob Mr. Daniels. (Addendum I, at 1460-1463). According to Mr. Miller, Petitioner said they could not leave any witnesses, and

asked Mr. Miller to bring along his handgun, duct tape, and gloves. (Addendum I, at 1461).

Mr. Miller testified that when they arrived at Mr. Daniels apartment, Petitioner asked for the marijuana, and Mr. Daniels said he was bagging it up and went into the kitchen. (Addendum I, at 1465-1466). He said that a female, Ms. Norman, was sitting on the couch watching television. (*Id.*) While Mr. Daniels was busy with the marijuana, the Petitioner moved over toward Ms. Norman, gave Mr. Miller a signal, and they both pulled out their guns. (Addendum I, at 1466). Although Mr. Miller was then supposed to tape the victims, he testified that he "choked again," and was unable to do so. (Addendum I, at 1467). He said the Petitioner made Ms. Norman) lay down, came over to the kitchen, told Mr. Miller to hold his shotgun, and took off his gloves. (*Id.*) The Petitioner then made Mr. Daniels lie on the floor, and the Petitioner taped him. (*Id.*)

Mr. Miller testified that at that point, the dogs in the apartment were running around them, and that the children came out of their room. (Addendum I, at 1467-1468). He said that Mr. Miller told Ms. Norman to get up and calm the children and put the dogs away. (*Id.*) He said the Petitioner went with Ms. Norman into the children's room, and then went into a room directly across from that room. (*Id.*) When they returned, the Petitioner told Ms. Norman to lie on the floor and he taped her. (*Id.*)

According to Mr. Miller, the Petitioner then started asking Mr. Daniels where he kept his "herb" and cocaine. (*Id.*) Mr. Daniels told the Petitioner he didn't have any, and asked the Petitioner not to hurt anyone. (*Id.*) Mr. Miller testified that Mr. Daniels was crying and begging the Petitioner not to hurt anyone. (Addendum I, at 1468-1469). At that point, the Petitioner started throwing the pillows from the couch and found a bag of marijuana. (*Id.*) The Petitioner then asked Mr. Daniels for his money. (Addendum I, at 1469). Mr. Daniels said that he didn't have any money, but he had a bank card in his back pocket. (*Id.*) Mr. Miller testified that the Petitioner took the bank card from Mr. Daniels and asked for the code numbers for the card. (*Id.*) He said that Mr. Daniels

repeated the code numbers until the Petitioner could repeat them back to Mr. Daniels. (*Id.*)

Mr. Miller testified that the Petitioner then told Mr. Daniels he was "Scarface" from Chicago, and "Givinsi" had sent him to clean up everything. (Addendum I, at 1469-1470). He said the Petitioner then opened one of the kitchen drawers, took out a knife, and repeatedly stabbed Mr. Daniels. (Addendum I, at 1470-1471). The Petitioner then stepped back and watched Mr. Daniels go into convulsions. (Addendum I, at 1472-1473). When Mr. Daniels stopped moving, the Petitioner then moved over to Ms. Norman and stabbed her twice. (Addendum I, at 1473-1474). According to Mr. Miller, before the Petitioner could stab Ms. Norman a third time, he pulled the Petitioner off, and said "let's get out of here." (Addendum I, at 1474). He said they both left the apartment through the back door. *Id.*

Detective Mark Garafola testified that the police found a shotgun during a search of Petitioner's apartment. (Addendum I, at 1589-1596). An agent of the Tennessee Bureau of Investigation testified that a plaster cast of tire tracks taken at the scene matched a tire taken from the Petitioner's car. (Addendum I, at 1645-1646).

As for evidence of robbery, Ms. Norman testified that she and Mr. Daniels had saved $300 for the purpose of buying a car, and that the money was kept in an envelope in a jewelry box in the bedroom she shared with Mr. Daniels. (Addendum I, 1336-1337). She testified that the money was there when the Petitioner and Mr. Miller came to the apartment, and to her knowledge, the money was not there when they left. (Addendum I, 1390).

Officer Patrick Taylor testified that he was the first officer on the scene to enter the adults' bedroom. (Addendum I, 1281). When he entered the bedroom, he observed a purse lying open on the bed with its contents scattered onto the bed. (Addendum I, 1300-1301). Ms. Norman testified that she had not left her purse in that position. (Addendum I, 1391). She did not, however, see the Petitioner or Mr. Miller go through her purse or take the $300. (Addendum I, 1407-1408).

Ms. Norman also testified that before he stabbed the victims, she heard the Petitioner ask Mr. Daniels for money,

and that Mr. Daniels told the Petitioner he had no money, but he had a bank card. (Addendum I, 1367-1368). She testified that the Petitioner took the bank card from Mr. Daniels' wallet, and asked Mr. Daniels the code number needed to use the card. (*Id.*) She said Mr. Daniels repeated the number twice for the Petitioner. (*Id.*)

Petitioner argues that the evidence of robbery is insufficient because none of the witnesses saw the Petitioner take $300 from the apartment, and that it was just as plausible, based on the evidence, that someone else had taken the money. Because the evidence of robbery is insufficient, Petitioner argues, there was also insufficient evidence from which the jury could find him guilty of felony murder.

Although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Under the *Jackson v. Virginia* standard, the evidence supporting the conviction need not be direct evidence. *York v. Tate*, 858 F.2d 322, 326-30 (6th Cir. 1988). Here, the jury heard testimony that the victims had $300 at their apartment before the Petitioner arrived, that the Petitioner asked for money before he stabbed the victims, that the Petitioner entered the bedroom where the money was kept,[5] the money was no longer in the apartment after the stabbings, and Ms. Norman's purse was found open on the bed in the bedroom where the money was kept.

In any event, both Ms. Norman and Mr. Miller testified that the Petitioner took Mr. Daniel's bank card. Petitioner argues that there was no evidence Mr. Daniels had a bank account, and therefore, the bank card had no value. Under Tennessee law, however, the value of the property taken is not material to a robbery conviction. *Cook v. State*, 3 Tenn. Crim. App. 685, 466 S.W.2d 530, 532 (1971).

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[5]Petitioner argues that the testimony of Mr. Miller and Ms. Norman conflict as to when or whether the Petitioner entered the bedroom. The jury was free, however, to credit the testimony of Mr. Miller that the Petitioner entered the bedroom before taping Ms. Norman. *See Walker v. Russell*, 57 F.3d 472, 475 (6th Cir. 1995) (the jury's credibility determinations are entitled to "special deference.")

Accordingly, the Court concludes that there was sufficient evidence adduced for the jury to find the Petitioner guilty of robbery and felony murder beyond a reasonable doubt.

Petitioner also argues that there is insufficient evidence of premeditation and deliberation to support his conviction for premeditated first degree murder. "Premeditation" and "deliberation" require coolness and consideration of the consequences of an act. *State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992). Mr. Miller testified that the Petitioner formed his plan to kill before he entered the victims' apartment. Mr. Miller also testified that the Petitioner was "cool" as he stabbed Mr. Daniels. Petitioner argues that Mr. Miller is not to be believed, and points out various discrepancies in his testimony. But credibility assessments are to be made by the jury. *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 868, 130 L.Ed.2d 808 (1995). The Court concludes that there was sufficient evidence to support Petitioner's conviction of premeditated first degree murder.

Finally, there was sufficient evidence for the jury to find Petitioner guilty of assault with intent to commit first degree murder. The evidence indicates that the Petitioner stabbed Ms. Norman twice, and would have continued if Mr. Miller had not stopped him. As stated above, Mr. Miller's credibility was for the jury to determine.

Inadequate Proportionality Review

Petitioner contends that the Tennessee Supreme Court did not conduct an adequate proportionality review of his death sentence (Amended Petition, at ¶C9). At the time Petitioner's conviction and sentence were reviewed by the Tennessee Supreme Court, a Tennessee statute required the court to make certain determinations, including whether: "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn. Code Ann. 39-2-205(c)(4). Failure to conduct a proportionality review, however, is not a constitutional violation, and the Court may not issue a writ of habeas corpus on the basis of an error of state law. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 874-75, 879, 79 L.Ed.2d 29 (1984); *McQueen v. Scroggy*, 99 F.3d at 1333-34.

On direct appeal, the Tennessee Supreme Court specifically concluded that Petitioner's sentence was not excessive or disproportionate to the penalty imposed in similar cases:

> We have previously reviewed the three aggravating circumstances found by the jury and we now find that the evidence supports the jury's finding of those aggravating circumstances and that they outweigh any mitigating circumstances. The sentence of death was not imposed in an arbitrary fashion and is not excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the defendant. This Court has previously upheld the imposition of the death penalty in numerous cases involving armed robbery. . .

State v. Jones, 789 S.W.2d at 552-53 (citations omitted).

Petitioner's allegations do not rise to the level of a constitutional violation. In any event, the Court concludes that the Tennessee Supreme Court adequately performed a proportionality review of Petitioner's sentence. Respondent is entitled to summary judgment on this claim.

Prosecutor's Questions During Guilt Phase

Petitioner claims that, over trial counsel's objection, the trial court allowed the prosecutor to ask improper questions during the guilt phase of his trial, which resulted in a denial of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments (Amended Petition, at ¶D4).

Erroneous state court evidentiary rulings may not serve as the basis for issuance of a writ of habeas corpus unless the error "fatally infected the trial and rendered it fundamentally unfair" so as to constitute a denial of due process. *Moore v. Tate*, 882 F.2d 1107, 1109 (6th Cir. 1989); *Duvall v. Reynolds*, 131 F.3d 907, 926 (10th Cir. 1997); *Ivy v. Bowersox*, 122 F.3d 675, 676 (8th Cir. 1997).

Petitioner complains that the prosecution improperly asked Norma Norman what was going through her mind when the Petitioner pointed a gun at her, and what was going through her mind when she saw her children come out of their room while the Petitioner and co-defendant Harold Miller

were holding guns on Norma Norman and the deceased, Patrick Daniels.

On direct appeal, the Tennessee Supreme Court addressed this issue as follows:

> Defendant questions the trial court overruling certain objections to questions posed by the State to witnesses at trial. He says questions asked of Norma Norman and Robert Jordan were irrelevant to any issue before the court, inflammatory, and deprived him of a fair trial.
>
> In the course of the State's proof during the guilt phase of the proceedings the State was allowed to ask Norman, 'what was going through your mind at that point?' [when defendant pointed a gun at her]. The witness responded that she thought defendant was going to kill her and Daniels. No objection was made to this question. The witness then testified about her two young children coming out of their bedroom. The State asked, '[A]s a mother to these two children, what is going through your mind when you see them come out there . . . ?' Over defendant's objection the witness was allowed to answer that she had been afraid the defendant would kill her children.
>
> Defendant was charged with assault with. intent to commit first degree murder with bodily injury against Norma Jean Norman. An assault has been defined as an act which conveys to the mind of the person set upon a well-grounded apprehension of personal injury or violence. *See Casey v. State*, 491 S.W.2d 90, 93-94 (Tenn. Cr. App. 1972). We are of the opinion the question and the response were appropriate under the circumstances. Defendant had the gun pointed between her eyes with the end of the barrel touching her. Shortly thereafter her two children came from their bedroom. The witness was asked by the State's attorney, 'as a mother to these two children, what is going through your mind when you see them come out there and Mr. Jones makes this statement.' The defendant had said, 'if we didn't get them back in there as quick as possible he would snap one of them's head,

> so fast it would make her head swim.' He also said that she had better get them back in their room before he killed them both. While the question in reference to the children may not have had the same relevance insofar as the assault was concerned, we are satisfied the question was harmless in view of defendant's actions.

State v. Jones, 789 S.W.2d at 550-51.

Petitioner also complains of questions the prosecutor asked Robert Jordan regarding the Petitioner's reaction to seeing the movie *Scarface* approximately six months before the murder with which Petitioner was charged. The Tennessee Supreme Court addressed this issue as follows:

> Reference to the testimony of Robert Jordan related to the State's question asking the witness how defendant had reacted to seeing the movie Scarface about six months before the killing. This was a particularly violent movie about a Cuban refugee who rose to the top of the drug business by killing off his competitors. The witness was allowed to testify over defense objection that defendant had acted like he was 'fascinated' by the movie. Defendant had identified himself as '*Scarface*' during the commission of the crimes. He told his victims that 'he had come from Chicago to Nashville to take over because things weren't being run right, that he was there to teach them a lesson and that he was going to clean up drug dealers.' We are of the opinion it was permissible for the State to link the defendant to the movie and that Jordan was competent to describe his observation of defendant's reaction to the movie. This line of questioning went pretty far afield and we consider it a practice to be avoided, however, the witness was testifying from his own observations and in view of defendant's statements in the course of the commission of the offense it was no more than harmless error under the circumstances.

State v. Jones, 789 S.W.2d at 551.

The Court concludes that the state court's factual findings are entitled to a presumption of correctness. Petitioner's

complaints about counsel do not relate to their handling of this issue, and the record reveals that trial counsel objected to these questions when they were asked. Furthermore, Petitioner's complaints about the conduct of the prosecutors do not suggest that they prevented him from fully presenting this claim to the state courts. Therefore, the Court concludes that Petitioner received a full and fair hearing on this issue before the state courts. In addition, the Court concludes that these findings are supported by the record. (Addendum I, at 1352-1357, 1430-1434).

In addition, the Court agrees with the state court's conclusion that the questions regarding Ms. Norman's state of mind when the Petitioner threatened to kill her were relevant to an element of the charge of assault. *See State v. Kinner*, 701 S.W.2d 224, 226-27 (Tenn. Crim. App. 1985) (assault is act creating in victim well-grounded apprehension of personal violence). Although the questions regarding the children were not directly relevant to the assault charge, the Court concludes that those questions did not render the trial fundamentally unfair.

Finally, while the Court believes that the Petitioner's "fascination" with the movie *Scarface* may not have been directly relevant to the elements of the crimes with which Petitioner was charged, this line of questioning served to explain Petitioner's alleged reference to the movie during commission of the crimes. Admission of this testimony did not render the trial fundamentally unfair.

Respondent is entitled to summary judgment on this issue.

Prosecutorial Misconduct During Sentencing: Publication of Indictments to Jury

Petitioner claims that the prosecution engaged in prosecutorial misconduct during sentencing by passing previous indictments to the jury after assuring the court that they would not do so, and also in allowing a witness to testify about Petitioner's prior convictions (Amended Petition, at ¶ D6).

On direct appeal, the Tennessee Supreme Court found that these matters constituted error but that the error did not require reversal:

Defendant says the trial court should have declared a mistrial when the State passed copies of previous indictments to the jury after assuring the court that would not happen, and also in allowing a State's witness to testify as to the facts of defendant's prior convictions.

Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.

The defense objection was appropriate. 'The conduct of the State's attorney bordered on deception by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was improper. However, we have reviewed this record carefully and conclude that the error does not require a reversal of the defendant's sentence. In a similar situation in *State v. Williams*, 657 S.W.2d 405-413

(Tenn. 1983) the Court, citing *Judge v. State*, 539 S.W.2d 340 (Tenn. Cr. App. 1976), had this to say:

> 'In consideration of whether improper conduct on the part of the State requires reversal, a court may look to several factors, such as the effect of curative measures taken by the trial court, the intent of the prosecution, the cumulative effect of the improper conduct and any other errors in the record, and the relative strength of the case.'
>
> We decline to remand this case for a new sentencing hearing. The defendant did not deny the homicide or the assault on the victims. He endeavored to mitigate the circumstances of the offenses by testifying that he suffered from a memory lapse regarding their occurrence. We give the State the benefit of the doubt insofar as the intent was concerned. We do not find any cumulative effect of the improper conduct nor is there other reversible error in the record. As in *Williams*, *supra*, we consider it pertinent to point out that the fact of a prior sentence has nothing to do with the conviction and should not be admitted as evidence except by agreement.

State v. Jones, 789 S.W.2d at 551-52.

The Petitioner does not appear to contest the underlying factual findings of the state court on this issue. Even if he does, however, the Court concludes that the state court's factual findings are entitled to a presumption of correctness. Petitioner's complaints about counsel do not relate to their handling of this issue. Petitioner's complaints about the conduct of the prosecutors do not suggest that they prevented him from fully presenting this claim to the state courts. Therefore, the Court concludes that Petitioner received a full and fair hearing on this issue before the state courts. In addition, the Court concludes that these factual findings are supported by the record.

As explained by the state court, the record indicates that after the trial court ruled that the prosecution would not be allowed to adduce evidence regarding the facts underlying

Petitioner's previous convictions or the sentence he received, the prosecutor stated that he did not intend to pass to the jury the records regarding those convictions. (Addendum I, 1794-1795). During the direct examination of Lewis Trammel of the United States Probation Office, however, the prosecutor admitted into evidence and published to the jury information indicating that the Petitioner had been charged with, but not convicted of, armed robbery. (Addendum I, 1808-1823).

Petitioner's claim focuses on the conduct of the prosecutor in disclosing the armed robbery charge to the jury, and the trial court's ruling allowing the witness to describe the "dangerous weapon" involved in the prior assault conviction as a knife. In order to establish prosecutorial misconduct, Petitioner must show that the conduct "was so egregious so as to render the entire trial fundamentally unfair.'" *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (quoting *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979)). *See also Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). The court is to examine "'the fairness of the trial, not the culpability of the prosecutor.'" *Pritchett*, 117 F.3d at 964. The allegation presents a mixed question of law and fact, which the Court reviews de novo. *Duvall v. Reynolds*, 131 F.3d at 933.

The standard for reviewing claims that a trial court erroneously admitted evidence is a similar one. Erroneous state court evidentiary rulings may not serve as the basis for issuance of a writ of habeas corpus unless the error "fatally infected the trial and rendered it fundamentally unfair" so as to constitute a denial of due process. *Moore v. Tate*, 882 F.2d at 1109; *Duvall v. Reynolds*, 131 F.3d at 926; *Ivy v. Bowersox*, 122 F.3d at 676.

Even if the Court assumes the trial court erred in admitting evidence that a knife was used in the prior assault, the Court is not persuaded that that evidence and the evidence that Petitioner had been charged with armed robbery rendered Petitioner's sentencing hearing fundamentally unfair. The jury had already found the Petitioner guilty of assault and murder before this evidence was admitted at the sentencing hearing. Moreover, in testifying during the sentencing

hearing, the Petitioner admitted that he committed the murder. The Court concludes that the Petitioner did not suffer any actual prejudice because the jury knew the type of weapon the Petitioner had used in a previous assault when they ruled on the existence of the three aggravating circumstances at sentencing.

Whether the Petitioner had robbed the victims in the course of committing the murder was an issue at sentencing and directly related to one of the aggravating circumstances. The Court is of the opinion, however, that admission of this evidence did not render the trial fundamentally unfair. First, the Court notes that the jury had already found the Petitioner guilty of armed robbery when this evidence was admitted at sentencing. Furthermore, the trial court gave a limiting instruction that the previous convictions were the only items of evidence they were to consider. *See Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990); *Garofolo v. Coomb*, 804 F.2d 201, 205 (2nd Cir. 1986) (prosecutor's improper remarks were harmless in light of other evidence and court's curative instruction).

Although the conduct of the prosecutor is troubling, Petitioner has not demonstrated that these errors rise to the level of a constitutional violation. Respondent is entitled to summary judgment on this claim.

Cross-Examination of Petitioner at Sentencing

Petitioner argues that the prosecutor's cross-examination of Petitioner during the sentencing phase was improperly inflammatory, irrelevant, and misleading, and was an unconstitutional attack on Petitioner's decision to invoke his Fifth Amendment privilege against self-incrimination during the guilt phase (Amended Petition, at ¶ D7).

The Tennessee Supreme Court concluded that the prosecutor's questioning did not constitute error because, under Tennessee law, the prosecution was allowed to rebut the defendant's testimony, which sought to establish mitigation by casting an innocent light on the homicide. *State v. Jones*, 789 S.W.2d at 551 (*citing State v. McKay*, 680 S.W.2d 447, 451 (Tenn. 1984)).

Although this issue has not been widely addressed, a few federal courts have examined the appropriate parameters of

cross-examination of a defendant during the penalty phase. The Third Circuit has held that a defendant who testifies during the penalty phase "could not claim a Fifth Amendment privilege against cross-examination or prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony." *Lesko v. Lehman*, 925 F.2d 1527, 1542 (3rd Cir. 1991). *See also Harvey v. Shillinger*, 76 F.3d 1528, 1535-36 (10th Cir. 1996) (Once a defendant chooses to testify during penalty phase, he waives privilege against self-incrimination as to his testimony).

The record reveals that during his direct examination at the sentencing hearing, Petitioner described his version of what happened on the night of the killing. He testified that he merely meant to frighten the victims, and that the gun he took with him was unloaded. (Addendum I, 1855-1857). He testified that he could not remember how the killing occurred, but that he was the one who stabbed Patrick Daniels, and assaulted Norma Norman. (Addendum I, 1864-1865). He said he did not realize he had stabbed Mr. Daniels until he saw it on the television news the next day. (Addendum I, 1867).

Petitioner indicated that his co-defendant, Harold Devalle Miller, lied about certain things in his testimony; and disputed Ms. Norman's testimony that he robbed her. (Addendum I, 1852, 1857, 1864, 1867)

On cross-examination, the prosecutor principally questioned Petitioner's theory that he came to the victims' house to frighten them, and not to rob them. The particular cross-examination questions to which Petitioner objects are questions seeking to confirm that Mr. Miller was telling the truth as to certain areas when he testified at trial even though Petitioner's counsel questioned his veracity. (Addendum I, 1891-1894).

The Court concludes that the prosecution did not exceed the scope of those issues Petitioner testified to on direct examination, and for which the Petitioner waived his Fifth Amendment privilege. The prosecution sought to bolster the credibility of Mr. Miller, which had been attacked by Petitioner on direct examination. The credibility of Mr. Miller was an issue at sentencing because his testimony

contradicted Petitioner's story that he came to the victims' house only to frighten the victims. Acceptance of Mr. Miller's version of events -- that Petitioner planned to rob the victims on the night in question -- would be relevant to application of one of the aggravating factors at issue -- whether the murder was committed while the defendant was attempting to commit a robbery.

The Court concludes that Petitioner's Fifth Amendment rights were not violated through the prosecution's cross-examination of the Petitioner at sentencing. Respondent is entitled to summary judgment on this issue.

State's Argument at Sentencing Regarding SEGM

Petitioner argues that the prosecutor knew that the Southeast Gospel Ministry ("SEGM") played an important role in influencing the Petitioner to commit the crimes for which he was convicted, but erroneously argued that the SEGM did not play a role in Petitioner's crimes.

In order to establish prosecutorial misconduct based on the prosecutor's closing argument, Petitioner must show that the prosecutor's comments were "'so egregious so as to render the entire trial fundamentally unfair.'" *Pritchett v. Pitcher*, 117 F.3d at 964 (quoting *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979)). *See also Donnelly v. DeChristoforo*, 94 S.Ct. at 1871. The allegation presents a mixed question of law and fact, which the Court reviews de novo. *Duvall v. Reynolds*, 131 F.3d at 933.

The portion of the prosecutor's argument to which Petitioner objects is as follows:

> You only heard Mr. Barrett tell you one thing, ladies and gentlemen, in his whole trial -- now, he voir dired you on, would you believe a psychiatrist, or a psychatric (sic) examination or whatever, about extreme emotional disturbance or whatever? There is none of that here today. We're down to him saying, I was confused about what I was there for. He comes up with this group, and he names off the names -- guys that give him guns that he used in this robbery, and he says that I was confused about what I was doing there. I think I was there to teach somebody a lesson -- like that, and like that (indicating exhibits)? I was in this

> group three or four months before I did these murders. Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group -- just a low down murderer, no morals -- no morals.
>
> He ties up two people. And, ladies and gentlemen, it's because of some religious affiliation or club. Well, where is that evidence, if those people can come in here and tell you that, yeah, it was that? Devalle Miller told you why it was. And you know something, ladies and gentlemen, there is one last link in all of this, and that is he still says that the Sunday night visit never happened, like Mr. Miller said it happened. And do you know why? Because if you believe it did happen -- if you believe that Devalle went there with him and was going to do this fake robbery -- well, he knows -- he knows that that story about being a religious cause will be rejected by you as bunk. He knows that . . .

(Addendum I, at 1981-1983).

To support his argument that the prosecution knew that SEGM played an important role in influencing him to commit the crimes at issue, Petitioner has filed the affidavit of Ross Alderman, who represented the co-defendant in this case, Harold Devalle Miller. (*See* Petitioner's Exhibit 16, Docket No. 114). Mr. Alderman states that the prosecutors met with Mr. Miller several times before the trial, and that during these meetings, Mr. Miller described SEGM in detail and said that the organization had been involved in some events leading up to the offense in this case. (*Id.*)

Although it is not a part of the record, the parties state that during jury selection, the trial court had an in-chambers conference concerning courtroom security. Respondent states that during that conference, defense counsel presented information to the prosecutor that Petitioner was a member of a religious organization, which raised security concerns. Petitioner states that the prosecutor "was sufficiently concerned about what he had learned about the SEGM that, at the close of jury selection, he requested defense counsel to turn over their jury list in order to protect the safety of the jurors." (Petitioner's Memorandum In Response To

Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing (Docket No. 113), at 89).

The record does indicate that prior to beginning of the sentencing hearing, Petitioner's counsel served the prosecutor with a letter indicating that he might call the prosecutor as a witness to testify that Petitioner was a member of SEGM. (Addendum I, at 1799-1803). The prosecutor objected, and told the trial court that his knowledge of SEGM was based on information obtained from Harold Devalle Miller and defense counsel. (*Id.*) Defense counsel did not call the prosecutor to testify on this point.

During the sentencing phase, Petitioner testified about SEGM. Petitioner stated that he was a member of SEGM, that the group had discussed "cleaning up the community," and the evil influence of "people that take hardened drugs and sell them." (Addendum I, at 1839). He said the organization did not discuss "eliminating" drug dealers, but did discuss how they should be confronted with something they fear. (Addendum I, at 1842-1843). Petitioner said that "no violence [was] ever really talked about, as far as killing nobody, or hurting anybody to the extent where we would violate the very thing that we say that we were about." (Addendum I, at 1846, 1848). The group did discuss, according to Petitioner, trying to blackmail drug dealers into providing money to SEGM. (Addendum I, at 1848).

On cross-examination, Petitioner testified that he was not suggesting that SEGM turned him into a murderer. (Addendum I, at 1875). He also testified that other members of the group, specifically Alan Boyd and William Beard, were not involved in the crimes. (Addendum I, at 1879).

The Court is not persuaded that the prosecutor's closing statements were improper. The Court construes the prosecutor's remarks as making two points. First, the prosecutor was arguing that even if the Petitioner was involved in a group that encouraged violence, he was still culpable, and pointed out that Petitioner had been convicted of murder before he joined SEGM. Second, the prosecutor argued that there was not enough evidence to establish that Petitioner was acting on the basis of a religious cause.

Petitioner's contention that the prosecutor argued SEGM had no influence on Petitioner when he knew that to be false does not apply to the first point made by the prosecutor. Even if the Petitioner could establish that SEGM played a vital role in Petitioner's crimes and that the prosecutor knew it, the prosecutor is free to argue that the group's involvement does not lessen the culpability of the Petitioner.

As for the second point made by the prosecutor, given the Petitioner's testimony during the sentencing phase of the trial that SEGM did not advocate violence or murder, the Court concludes that it was not improper for the prosecutor to argue that the evidence was not sufficient to establish that Petitioner acted on the basis of a religious cause.

Petitioner has not shown that the prosecutor's comments were so egregious so as to render the entire trial fundamentally unfair. Accordingly, Respondent is entitled to summary judgment on this claim.

Defense Counsel Represented Petitioner Under Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by SEGM, and was promised an additional $5,000 that was never paid (Amended Petition, at ¶ E1). In order to establish a Sixth Amendment violation, the petitioner must show that an actual conflict of interest affected his lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996). Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. *Mays*, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. *Jones v. State*, 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes Mann testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner testified that SEGM was not involved in the crimes for which he was convicted. Moreover, Mr. Barrett elicited testimony about SEGM from the Petitioner at the sentencing hearing, and mentioned the Petitioner's connection with the group during his argument.

Petitioner, however, has filed under seal a Verified Motion (Docket 152) that raises factual allegations about the role and motivations of SEGM and certain of its members. Based on the Verified Motion, the Court concludes that material factual issues exist, which prevent summary judgment on this issue.

Failure to Investigate or Present Evidence About Petitioner's Mental Health

Petitioner contends that trial counsel was ineffective for failing to investigate or to present evidence regarding Petitioner's mental health during the guilt phase or during the sentencing phase (Amended Petition, at ¶ E2).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was not within the range of competence demanded of attorneys in criminal cases; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d. 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065.

In order to show actual prejudice, a petitioner must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact. *McQueen*, 99 F.3d at 1311.

On direct appeal, the Tennessee Supreme Court addressed this issue, and stated that: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." *State v. Jones*, 789 S.W.2d. at 552.

In addressing the issue during the post-conviction process, both the trial court and the Tennessee Court of Criminal Appeals held that trial counsel had been ineffective for failing to investigate Petitioner's background and mental health history, but that Petitioner was not prejudiced by that failure:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

In this Court, Petitioner contends that had his trial counsel provided effective assistance, they would have introduced evidence regarding his mental state at the time of the offense, and they would have introduced his mental health history during sentencing as a mitigating factor. To support this claim, Petitioner has filed two affidavits of Dr. Robert Sadoff, a forensic psychiatrist, who opines that, at the time of the offense, Petitioner was, more likely than not, insane, and

could not have engaged in the deliberation and premeditation required for first degree murder. Petitioner has also filed the affidavit of Dr. Diana McCoy, a "mitigation expert," who opines that Petitioner's social and mental health history would have served as effective mitigation evidence at sentencing.

Based on these affidavits, the Court concludes that material factual issues exist which prevent the issuance of summary judgment on this issue.

Conclusion

The Court grants Respondent's Second Motion for Summary Judgment as to all the claims raised in the Motion, except the conflict of interest and ineffective assistance of counsel claims.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

ORDER

Pending before the Court are Respondent's First Motion For Partial Summary Judgment (Docket No. 54), and Petitioner's Motion To Strike Procedural Defenses (Docket No. 90). For the reasons set forth in the accompanying Memorandum, the Court DENIES both Motions.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

MEMORANDUM

I. Introduction

Pending before the Court for decision are Respondent's First Motion For Partial Summary Judgment (Docket No. 54), and Petitioner's Motion To Strike Procedural Defenses (Docket No. 90). Through his Motion, Respondent raises procedural defenses to several of Petitioner's claims. Through his Motion To Strike, Petitioner essentially seeks summary judgment that these procedural defenses do not apply. For the reasons set forth below, the Court DENIES both Motions because there exist genuine issues of material fact that make summary Judgment on these issues inappropriate.

II. The Standards for Considering Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric*

Indus. Co, v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at 2553. In order to create a genuine factual issue, the nonmoving party must show there is sufficient evidence favoring the nonmoving party for the factfinder to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

III. Procedural Defenses

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.[1]

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

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[1]Petitioner also argues that state procedural rules should not prevent adjudication of claims by this Court. It does not appear, however, that Respondent relied on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. *See Teague*, 109 S.Ct. at 1069.

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. *Id.* As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. *Id.* A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

In order to establish actual innocence of the crime for which he was convicted, a petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 115 S.Ct. at 867 (quoting *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2649-50, 91 L.Ed.2d 397 (1986)). In order to establish actual innocence of the death penalty, a petitioner must establish "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2517, 120 L.Ed.2d 269 (1992).

Although Petitioner relies on evidence already in the record for most of his arguments, to support his claim that he is actually innocent, Petitioner has filed the affidavit of Dr.Kris Sperry, a forensic pathologist, who opines that the clothes of the person who stabbed the victim in this case would have had blood on them, and that no blood was found on Petitioner's clothes. This evidence, Petitioner contends, indicates that he did not commit the murder for which he was convicted.

Petitioner has also filed two affidavits of Dr. Robert Sadoff, a forensic psychiatrist, who opines that, at the time of the offense, Petitioner was insane, and could not have engaged in the deliberation and premeditation required for first degree murder.

Based on these affidavits, the Court concludes that material factual issues exist which prevent the issuance of

summary judgment on the procedural default issues.[2] For this same reason, the Court denies Petitioner's motion seeking to strike Respondent's procedural defenses.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

[2]Although resolution of Petitioner's other objections to procedural default may not require resolution of genuine factual disputes, the Court need not decide those issues if the Petitioner establishes actual innocence.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

ORDER

Pending before the Court is Petitioner's First Motion For A Partial Summary Judgment (Docket No. 88). For the reasons stated in the accompanying Memorandum, the Court DENIES the Motion.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN

v.

RICKY BELL

No. 3:96-0380
JUDGE CAMPBELL

MEMORANDUM

I. Introduction

Abu-Ali Abdur'Rahman, Petitioner, has been sentenced to death for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. Currently pending before the Court for decision is Petitioner's First Motion For A Partial Summary Judgment (Docket No. 88). The Motion seeks summary judgment on two issues regarding the Tennessee trial court's jury instructions at sentencing: (1) "heinous, atrocious, or cruel" aggravating circumstances; and (2) "unanimity." For the reasons set forth below, the Court DENIES the Motion.

II. The Standards for Considering Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at 2553. In order to create a genuine factual issue, the nonmoving party must show "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

A preponderance of the evidence standard is used in this determination. *Id.* Therefore, if the evidence offered by the nonmoving party is "merely colorable,"' or "is not significantly probative," the motion for summary judgment may be granted. *Id. See also Matsushita Electric*, 106 S.Ct. at 1356.

III. The Trial Court's Instructions Regarding the "Heinous, Atrocious or Cruel" Aggravating Circumstance

Petitioner argues that the state trial court's instructions to the jury regarding the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague, and invited the jury to impose the death penalty in an arbitrary fashion in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment requires that a state's capital sentencing scheme "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980)(footnotes omitted). Thus, a state's definition of aggravating circumstances -- those circumstances that make the defendant "eligible" for the death penalty -- must be

sufficiently specific to avoid the arbitrary and capricious infliction of the death penalty. 100 S.Ct. at 1765.

A state appellate court may, however, cure an unconstitutionally vague aggravating circumstance by adopting a narrowing construction on appeal. The Supreme Court has specifically held that a state satisfies the constitutional requirement that it limit sentencing discretion by adopting a constitutionally narrow construction of a facially vague aggravating circumstance, and by applying that construction to the facts of a particular case. *Richmond v. Lewis*, 506 U.S. 40, 113 S.Ct. 528, 534, 121 L.Ed.2d 411 (1992); *Lewis v. Jeffers* 497 U.S. 764, 110 S.Ct. 3092, 3101, 111 L.Ed.2d 606 (1990); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990).

When a petitioner argues that the state court misapplied that narrowing construction, the Court should hold the state court's decision arbitrary only if, viewing the facts in the light most favorable to the prosecution, no reasonable sentencer could have reached the same conclusion as the state court. 110 S.Ct at 3102-04.

In this case, the state trial court instructed the jury as follows:

> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * *
>
> (2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;
>
> * * *
>
> In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful --

> causing suffering -- excuse me -- painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

(Addendum I, at 1990-91).

In *Godfrey v. Georgia*, the Supreme Court determined that the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" was unconstitutionally vague. 100 S.Ct. at 1762. The court's instructions to the jury did not elaborate on this aggravating circumstance, and the jury recited that a death sentence was imposed because the murder was "outrageously or wantonly vile, horrible or inhuman." *Id.*

In reaching its decision that the jury's finding was not sufficiently specific, the Court stated:

> There is nothing in these few words [outrageously or wantonly vile, horrible and inhuman], standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. . .

100 S.Ct. at 1765.

The Court then concluded that this standard less imposition of the death sentence was not cured by the review of the sentence on appeal. *Id.* Although the Georgia Supreme Court had previously limited imposition of this aggravating circumstance to cases in which the defendant engaged in torture or aggravated battery of the victim prior to death, those limiting circumstances were not imposed by the court in reviewing Godfrey's death sentence. 100 S.Ct. at 1765-67. Indeed, the Court explained, the record suggested that Godfrey's victims died instantaneously as a result of a

shotgun wound, and were not tortured or battered prior to their death. *Id.*

Eight years later, the Court overturned a death sentence imposed by an Oklahoma jury based on a similar aggravating circumstance. In *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the jury found two aggravating circumstances to exist: that the defendant "'knowingly created a great risk of death to more than one person;'" and that the murder was "'especially heinous, atrocious, or cruel.'" 108 S.Ct. at 1856. In determining that the latter aggravating circumstance afforded the sentencer too much discretion, the Court explained that the language "especially heinous, atrocious or cruel" gave no more guidance than the language found at issue in *Godfrey*. 108 S.Ct. at 1859. Also, as in *Godfrey*, the Oklahoma appeals court did not cure the invalidity. *Id.*

The Court distinguished its decisions in *Godfrey* and *Maynard* in *Walton v. Arizona*, 110 S.Ct. at 3056-58. In *Walton*, the Court upheld application of the aggravating factor "especially heinous, cruel or depraved," which had been applied by a state trial judge under Arizona law. *Id.* The Court explained that the state trial judge had applied a limiting definition to this aggravating circumstance, which had been established by the Arizona appellate courts and required the government to show that the victim suffered mental anguish or physical abuse before his death. 110 S.Ct. at 1057-58.

In *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 2121-22, 119 L.Ed.2d 326 (1992), the Court held that a state trial judge did not err in applying the "especially heinous, atrocious and cruel" aggravating factor because he is presumed to have applied a narrowing construction given by the state's appellate courts applying this factor in strangulation cases.

In *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995), the Sixth Circuit held that application of the same aggravating circumstance at issue here was invalid because the state trial court's instruction consisted only of the bare words of the statute, *i.e.* "The murder was especially heinous, atrocious or

cruel in that it involved torture or depravity of mind." The State conceded error in that case. *Id.*

In this case, the trial court's instruction was more detailed than that given in *Godfrey, Mavnard*, and *Houston*. Petitioner argues, however, that the instruction did not clearly require the jury to find that the crime involved torture, nor did it adequately define the term "depravity." The Court need not decide this issue because even if the definition is held to be unconstitutionally vague, the Tennessee Supreme Court cured that error by adopting a narrowing construction on appeal.

At the time Petitioner's appeal was pending before the Tennessee Supreme Court, the Tennessee courts had adopted a narrowing construction of the "heinous, atrocious and cruel" aggravator. In *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985), the Tennessee Supreme Court First explained that the second clause of the statutory provision (" . . . in that it involved torture or depravity of mind") "qualifies, limits and restricts" the phrase in the first clause ("heinous, atrocious and cruel"). Therefore, the court concluded, in order to prove that the crime was heinous atrocious or cruel, the State must prove that it involved "torture of the victim or depravity of the mind of the killer." *Id.*

The court then held that "torture" means "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *Id.* Proving that torture occurred, the court explained, "necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved." *Id.*

If the State does not prove torture as defined by the court, however, it may establish depravity only by proving that the acts demonstrating depravity "occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim." *Id.* Thus, the court explained, mutilation of the dead body of the victim may be held to constitute depravity of mind only if the mutilation occurred so soon after the victim's death that it may be fairly inferred that the murderer possessed that state of mind at the time of the

actual killing. 690 S.W.2d. at 530. *See also State v. Hines*, 758 S.W.2d 515, 521-23 (Tenn. 1988).

A similar narrowing construction was approved by the United States Supreme Court in *Walton v. Arizona*, as discussed above. *See also Maynard*, 108 S.Ct. at 1859 (a heinous, atrocious or cruel aggravator would be constitutionally acceptable if construed to require torture or serious physical abuse).

On appeal in this case, the Tennessee Supreme Court addressed this issue as follows:

> It is defendant's insistence that the proof introduced was insufficient to establish that the murder of Patrick Daniels was especially heinous, atrocious or cruel and therefore the death penalty was unconstitutionally invoked. He argues that the State must show that he inflicted torture on the victim prior to death or that he committed acts evincing a depraved state of mind.
>
> The victim in this case was bound, gagged, and blindfolded with duct tape. He was distressed, crying and begging not to be hurt. Defendant stood over him and stabbed him six times, four times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> . . . There is no doubt that the evidence in this case was sufficient to support each of the [three] aggravating circumstances found by the jury.

State v. Jones, 789 S.W.2d 545, 550 (Tenn. 1990).

That the court did not specifically cite *Williams* and its progeny does not necessarily mean the court failed to apply the narrowing construction of *Williams* to the facts of the case. In determining whether application of a vaguely-defined aggravator was cured on appeal, the Supreme Court has looked to applications of the narrowing construction to the facts of the case, rather than the state court's citation of previous authority. For example, in *Godfrey*, 100 S.Ct. at

1764-67, the Supreme Court determined that the state appellate court had not actually applied its previously recognized narrowing construction to the facts of the case, even though the state court cited the cases in which the narrowing construction was adopted.

As noted above, in prior cases, the Tennessee Supreme Court held that in order to satisfy the heinous, atrocious or cruel aggravating circumstance, the State was required to show that the defendant engaged in torture of the victim while the victim was alive, or that the defendant otherwise acted in a depraved manner, for example, by mutilating the victim's body immediately after death. *State v. Williams*, 690 S.W.2d at 529; *State v. Hines*, 758 S.W.2d at 521-23. Even though the Tennessee Supreme Court did not cite these decisions in deciding Petitioner's appeal, this Court presumes that the court knew the applicable law, *see Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1554, 1540-41, 123 L.Ed.2d 188 (1993) (federal court must presume that state trial judge, who sentenced defendant, knew and applied any existing narrowing construction of vague aggravating circumstance); *Walton*, 110 S.Ct at 3057 (trial judges are presumed to know the law and to apply it in making their decisions), and the facts recited by the court indicate that it applied that law to the facts of Petitioner's crime. The court concluded that the Petitioner had engaged in torture of the victim, and/or acted with a depraved mind, by binding, gagging and blindfolding the victim with duct tape, then stabbing the victim repeatedly while the victim pleaded for his life, and watching as the victim went into convulsions with blood spewing from his mouth.

The Tennessee Supreme Court's recitation of these facts indicates that it applied a constitutional narrowing construction to this aggravating circumstance. Furthermore, this Court concludes that a reasonable factfinder would have agreed that Petitioner had engaged in torture of the victim prior to his death and acted with depravity of mind.

Petitioner is not entitled to judgment as a matter of law on this issue.

IV. The "Unanimity" Language of the Sentencing Instruction

Petitioner argues that the trial court's charge to the jury at sentencing violated the Eighth Amendment because it led them to believe that they had to unanimously agree as to any mitigating circumstances, and because it failed to inform the jury that if they could not agree on a verdict, the Petitioner would be sentenced to life imprisonment

In *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), the Court settled the issue of what standard should be applied in reviewing jury instructions the petitioner claims impermissibly restricted the jury's consideration of relevant evidence: "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S.Ct. at 1198. The Court noted the strong policy in favor of an accurate determination of the appropriate sentence in a capital case, but also noted the equally strong policy against retrials years later. *Id.* The Court explained:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id.

With regard to Petitioner's first argument, it is well established that in considering whether to impose the death penalty, a jury must be allowed to consider any mitigating circumstance, and that the jury need not unanimously agree as to the existence of any mitigating circumstance considered. *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 1865-66, 100 L.Ed.2d 384 (1988); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978).

In *Mills*, 108 S.Ct. at 1870, the Court held that petitioner's death sentence was unconstitutional because there was a substantial probability that reasonable jurors would have

interpreted the judge's sentencing instructions and the verdict form as preventing them from considering any mitigating circumstance unless they unanimously agreed on the existence of that mitigating circumstance. Under Maryland's capital sentencing statute, if the sentencer unanimously finds the existence of aggravating circumstances, it then determines whether any mitigating circumstances outweigh the aggravating circumstances. 108 S.Ct. at 1865-66. In implementing this procedure, the trial court designed a verdict form that stated:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked 'yes' has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked 'no' has not been proven BEYOND A REASONABLE DOUBT:

108 S.Ct. at 1870 (Appendix to the Opinion of the Court). The form then listed ten aggravating circumstances followed by boxes which the jury could mark "yes" or "no." 108 S.Ct.at 1870-71.

Section 11 of the verdict form stated:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE:

108 S.Ct. at 1871. The form then listed seven specific mitigating circumstances followed by boxes for "yes" and "no," and an eighth "catch all" that required the jury to write in any other mitigating circumstance that applied. 108 S.Ct. at 1871-72.

Section III stated:

> Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked 'yes' in Section I.

108 S.Ct. at 1872. This statement was followed by boxes for "yes" and "no." *Id.*

The Court found that this form and the trial court's instructions suggested that the jurors could only consider mitigating circumstances which they unanimously agreed existed. 108 S.Ct. at 1868-69. The Court explained that:

> Section III instructed the jury to weigh only those mitigating circumstances marked "yes' in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be 'precluded from considering, as a mitigating factor, [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death,' if even a single juror adhered to the view that such a factor should not be so considered.

108 S.Ct. at 1868 (citation and footnote omitted).

The Court addressed this same issue two years later in *McKoy v. North Carolina*, 494 U.S. 43 3, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). In *McKoy*, 110 S.Ct. at 1230, the verdict form specifically asked the jury: "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The trial judge orally instructed the jury that if they did not unanimously find each of the mitigating circumstances by a preponderance of the evidence, they were to write "no" as to each mitigating circumstance listed. *Id.* The verdict form as so stated that the jury was to indicate unanimous agreement by writing "yes" or "no" as to each mitigating circumstance. *Id.*

The Court held that the instructions and form used by North Carolina impermissibly limited jurors consideration of mitigating evidence, and was, therefore, contrary to the holding of *Mills v. Marvland*, 110 S.Ct. at 1234. Consequently, the Court vacated the petitioner's death sentence. *Id.*

The lower courts have addressed the issue of whether an instruction that did not explicitly require unanimity on mitigating circumstances nonetheless led the jury to believe unanimity was required under *Mills* and *McKoy*. In an en

banc opinion in *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1108-09 (6th Cir. 1990), four members of the Sixth Circuit concluded that the instructions given were unconstitutional because they suggested unanimity on mitigating circumstances. The other nine members of the court disagreed. 919 F.2d at 1120-21.

Although the court did not specifically describe the instructions and verdict form used by the trial court, the nine-justice majority indicated that:

> The instructions carefully stated that finding an aggravating factor required such agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite. The instructions were not misleading.

919 F.2d at 1121.

More recently, a panel of the court noted its concern with unanimity instructions, but did not squarely address the issue. In *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997), the court held that the case would be remanded for resentencing because the petitioner had received ineffective assistance of counsel during sentencing. Consequently, the court explained, it was unnecessary to address the issue of "whether the instruction on mitigating circumstances created a substantial possibility that the jury interpreted the instruction to prevent them from individually considering a mitigating circumstance unless they unanimously agreed on that circumstance." 919 F.2d at 849. The court noted, however, its "serious concerns" that the instructions "did just that." *Id.* The court did not describe the instructions or verdict form or otherwise indicate what language it considered might be constitutionally impermissible.

The Third Circuit squarely addressed the *Mills/McKoy* issue in *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3rd Cir. 1991). The instructions in *Zettlemover* stated in part: ".... you are obligated [to impose the death penalty] if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance

outweighs any mitigating circumstances." *Id.* The verdict form used similar language. 923 F.2d at 308.

The court concluded that the instructions were not defective. *Id.* The court pointed out that unlike *Mills*, the jury was not explicitly told that they must unanimously agree to mitigating circumstances. *Id.* In addition, the court explained, the instructions specifically stated that the jury must unanimously agree as to aggravating circumstance, and specify the aggravating circumstances it found. *Id.* That the instructions did not state similar requirements regarding mitigating circumstances, indicated that unanimity was not required, and that the consideration of mitigating circumstances was "broad and unrestricted." *Id.* Finally, the court pointed out, the statement quoted above "indicates only that the jury's ultimate conclusion must be unanimous, not that each interim step in its deliberations be unanimous." *Id.* *See also Duvall v. Reynolds*, 1997 WL 758810, at * 20-21 (10th Cir. Dec. 10, 1997) (In reviewing a similar charge, court concludes that unanimity language refers "only to the jury's balancing of aggravating versus mitigating circumstances, and not to the initial determination of whether mitigating circumstances exist in the first place."); *Powell v. Bowersox*, 112 F.3d 966, 970-71 (8th Cir. 1997)(Court finds that similar instructions "deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist.").

In a more recent decision, *Frey v. Fulcomer*, 1997 WL 7933 10, at * 6-8 (3rd Cir. Dec. 30, 1997), the Third Circuit reached a different conclusion in reviewing an instruction that stated in part: " . . . the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances . . ." *See also Kubat v. Thieret*, 867 F.2d 351, 37173 (7th Cir. 1989) (Court concluded that instruction that stated in part: "If, after your deliberations, you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence. . ." was unconstitutional under *Mills/McKoy*).

The Fourth Circuit has addressed this issue in several cases involving instructions used by North Carolina courts. In

Maynard v. Dixon, 943 F.2d 407, 418 (4th Cir. 1991), the jury had been asked to answer four questions:

> Issue One: Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?
>
> Issue Two: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?
>
> Issue Three: Do you find one or more mitigating circumstances?
>
> Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances?

943 F.2d at 419.

The court concluded that the instructions and verdict form did not give the jury the impression that it must unanimously conclude that mitigating circumstances exist. *Id.* The court noted that question three in the verdict form did not require unanimity, and that the court did not instruct the jury to agree on mitigating circumstances. *Id. See also Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993) (court upheld constitutionality of an instruction that stated: "[The issue is] do you find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg [sic] any mitigating circumstance or circumstances found by you.")

In *Noland v. French*, 1998 WL 2804 (4th Cir. Jan. 7, 1998), the court upheld the same instructions used in *Maynard* with the addition of a general unanimity instructions given just before the judge released the jury to deliberate: "After you have reached a unanimous decision as to each issue . . . have your Foreman mark the appropriate place or places on the issues and recommendation forms." Slip op. at *4. The general unanimity instruction was not directed to any particular issue or question listed on the verdict form. *Id.*

The court concluded that there was not a reasonable likelihood that this instruction led the jury to believe they were required to unanimously agree on mitigating circumstances. *Id.* The court pointed out that this statement

was a supplemental instruction given after an explanation of the specific and detailed instructions contained on the verdict form. *Id.* The court found that "[i]t was entirely clear from this portion of the instructions that three of the four issues on the verdict form required juror unanimity while one, the mitigating factor question, did not." *Id.* The court concluded that it was not reasonably probable that the jury would have disregarded these instructions based on the court's final comment. *Id.*

In this case, the substantive portions of the trial court's instructions are as follows, with italics highlighting those portions which are the focus of Petitioner's challenge:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. *Your verdict must be unanimous as to either form of punishment.*
>
> * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:
>
> Punishment of Death
>
> End quote.

> The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. *Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding*, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.
>
> If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

(Addendum I, at 1992-94).

At the end of the instructions, the judge instructed the jury that:

> The verdict must represent the considered judgment of each juror. *In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.*

(Addendum I, at 1996).

The first paragraph merely states that the verdict must be unanimous. This is a correct statement, and it does not mention mitigating circumstances.

The next instruction challenged by Petitioner states that the jury must state in its finding that aggravating circumstances outweigh *any* mitigating circumstances. The jury is then instructed that the decision must be unanimous. A reasonable reading of this instruction indicates that the jury must unanimously agree about the result of weighing the aggravating circumstances against *any* mitigating circumstances.

Finally, the last instruction challenged by Petitioner was given immediately before the jury was released and did not refer to or attempt to alter any of the specific instructions

already given by the judge. *See United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993) (similar charge did not coerce jury into verdict for death sentence).

Considering the jury instructions as a whole, the Court concludes that there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. Unlike *Mills* and *McKoy*, the jury was not explicitly told that mitigating circumstances required unanimity. Like the Sixth Circuit majority in *Kordenbrock*, and the other decisions set forth above, this Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case.

Furthermore, it is reasonable to assume that because the jury was explicitly told they must agree on aggravating circumstances, and they were not told mitigating circumstances required unanimity, they would conclude that unanimity was not required as to mitigating circumstances.

The verdict form in the instant case was not preserved. The form to be used in capital sentencing cases at the time Petitioner was sentenced, however, was proscribed by statute. Subsection (f) of that statute, Tennessee Code Annotated 39-2-203, provides that the jury shall report its verdict of life imprisonment on a form "which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment."

This language was to be followed by a signature line for each juror.

Subsection (g) provided that the jury shall report its verdict of a death sentence on a form "which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to

outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death."

This language was also to be followed by a signature line for each juror.

Petitioner argues that the language in item 2 on the "Punishment of Death" form suggests that the jury must unanimously find the existence of mitigating circumstances. The Court concludes that a reasonable juror would read the instruction to require unanimity only as to the results of the weighing process, not that the jury must unanimously agree that a mitigating circumstance exists. The interpretation Petitioner suggests requires that the instruction be read out of context.

Petitioner is not entitled to summary judgment as to this issue.

Petitioner also argues that the instructions and verdict form were unconstitutional because they failed to advise the jury that life imprisonment would result if they failed to reach a unanimous verdict. But several federal courts have held that there is no constitutional requirement that the jury be told that the result of a failure to reach unanimity would result in imposition of a life sentence. In *United States v. Chandler*, 996 F.2d at 1089, the court explained that this conclusion is supported by "the general interest the criminal justice system has in unanimous verdicts." The court noted that: "[a]sking the jury to return a unanimous verdict forces jurors to examine their views on the case and engage in discussions and deliberations as they attempt to resolve their differences." *Id.* *See also Zettlemoyer*, 923 F.2d at 309; *Evans v. Thompson*, 891 F.2d 117, 123-24 (4th Cir. 1989).

Accordingly, Petitioner is not entitled to summary judgment on this issue.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, WARDEN,
Respondent-Appellant/Cross-Appellee.

No. 98-6568/6569

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEFORE: SILER, BATCHELDER, and COLE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

CIRCUIT COURT DECISIONS FINDING PREJUDICE AT SENTENCING BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL

Antwine v. *Delo*, 54 F.3d 1357, 1368 (CA8 1995), *cert. denied*, 516 U.S. 1067 (1996) (mental illness).

Armstrong v. *Dugger*, 833 F.2d 1430, 1432-34 (CA11 1987) (deprived childhood, low IQ, good character).

Battenfield v. *Gibson*, 236 F.3d 1215, 1235 (CA10 2001) (mitigation of prior conviction, dysfunctional family history, good character).

Baxter v. *Thomas*, 45 F.3d 1501, 1513-15 (CA11), *cert. denied*, 516 U.S. 946 (1995) (mental illness, low IQ).

Bean v. *Calderon*, 163 F.3d 1073, 1080-81 (CA9 1998), *cert. denied*, 528 U.S. 929 (1999) (childhood abuse, mental illness, low IQ, drug abuse).

Blake v. *Kemp*, 758 F.2d 523, 534 (CA11), *cert. denied*, 474 U.S. 998 (1985) (good character).

Blanco v. *Singletary*, 943 F.2d 1477, 1505 (CA11 1991), *cert. denied*, 504 U.S. 946 (1992) (childhood poverty, mental illness, low IQ).

Brewer v. *Aiken*, 935 F.2d 850, 858-59 (CA7 1991) (troubled childhood, mental illness, low IQ).

Cave v. *Singletary*, 971 F.2d 1513, 1519 (CA11 1992) (good character).

Clabourne v. *Lewis*, 64 F.3d 1373, 1384-87 (CA9 1995) (mental illness).

Collier v. *Turpin*, 177 F.3d 1184, 1202-04 (CA11 1999) (good character).

Dobbs v. *Turpin*, 142 F.3d 1383, 1386-87 (CA11 1998) (dysfunctional childhood).

Emerson v. *Gramley*, 91 F.3d 898, 906-07 (CA7 1996), *cert. denied*, 520 U.S. 1122 (1997) (childhood abuse, low IQ).

Evans v. *Lewis*, 855 F.2d 631, 637-39 (CA9 1988) (mental illness).

Hall v. *Washington*, 106 F.3d 742, 752-53 (CA7), *cert. denied*, 522 U.S. 907 (1997) (good character).

Harris v. *Dugger*, 874 F.2d 756, 763-64 (CA11), *cert. denied*, 493 U.S. 1011 (1989). (good character).

Hendricks v. *Calderon*, 70 F.3d 1032, 1044 (CA9 1995), *cert. denied*, 517 U.S. 111 (1996) (childhood abuse, mental illness, substance abuse).

Hill v. *Lockhart*, 28 F.3d 832, 846-47 (CA8 1994), *cert. denied*, 513 U.S. 1102 (1995) (mental illness).

Horton v. *Zant*, 941 F.2d 1449, 1463 (CA11 1991), *cert. denied*, 503 U.S. 952 (1992) (good character).

Jackson v. *Calderon*, 211 F.3d 1148, 1163 (CA9 2000), *cert. denied*, 121 S.Ct. 764 (2001) (childhood abuse, mental illness).

Johnson v. *Kemp*, 781 F.2d 1482 (11th Cir. 1986) (*aff'g.* 615 F.Supp. 335) (good character).

Kenley v. *Armontrout*, 937 F.2d 1298, 1308 (CA8), *cert. denied*, 502 U.S. 964 (1991) (mental illness, alcohol abuse).

Kubat v. *Thieret*, 867 F.2d 351, 367 (CA7), *cert. denied*, 493 U.S. 874 (1989) (good character).

Lewis v. *Lane*, 832 F.2d 1446, 1458 (CA7 1987), *cert. denied*, 488 U.S. 829 (1988) (mitigation of prior convictions).

Lloyd v. Whitley, 977 F.2d 149, 159-60 (CA5 1992), *cert. denied*, 508 U.S. 911 (1993) (mental illness).

Loyd v. *Smith*, 899 F.2d 1416, 1426 (CA5 1990) (childhood abuse, mental illness, substance abuse).

Lockett v. *Anderson*, 230 F.3d 695, 716 (CA5 2000) (mental illness).

Magill v. *Dugger*, 824 F.2d 879, 888-89 (CA11 1987) (mental illness).

Mak v. *Blodgett*, 970 F.2d 614, 620-21 (CA9 1992), *cert. denied*, 507 U.S. 951 (1993) (good character, cultural assimilation problems).

Middleton v. *Dugger*, 849 F.2d 491, 493 (CA11 1988) (childhood abuse, mental illness, low IQ, drug abuse).

Neal v. *Puckett*, 239 F.3d 683, 691 (CA5 2001) (childhood abuse, low IQ, sexual abuse in prison).

Pickens v. *Lockhart*, 714 F.2d 1455, 1466-7 (CA8 1983) (childhood abuse, emotional instability).

Siripongs v. *Calderon*, 35 F.3d 1308, 1316 (CA9 1994), *cert. denied*, 513 U.S. 1183 (1995) (troubled childhood, cultural assimilation problems).

Smith v. *Stewart*, 140 F.3d 1263, 1270-71 (CA9), *cert. denied*, 525 U.S. 929 (1998) (antisocial personality disorder, drug abuse, good character).

Smith v. *Stewart*, 189 F.3d 1004, 1011-14 (CA9 1999), *cert. denied*, 121 S.Ct. 358 (2000) (childhood abuse, mental illness).

Stephens v. *Kemp*, 846 F.2d 642, 652-55 (CA11), *cert. denied*, 488 U.S. 872 (1988) (mental illness).

Wade v. *Calderon*, 29 F.3d 1312, 1232-25 (CA9 1994), *cert. denied*, 513 U.S. 1120 (1995) (childhood abuse, mental illness).

TENNESSEE CAPITAL SENTENCING STATUTE AT TIME OF STATE TRIAL

39-2-203 Sentencing for first-degree murder.

* * * *

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____	/s/ _____
Jury Foreman	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating

circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall,

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we the jury, unanimously find that the punishment shall be death.

/s/ _____	/s/ _____
Jury Foreman	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____
Juror	Juror
/s/ _____	/s/ _____

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a

sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

* * *

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

* * *

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

* * *

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device of bomb;

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

EXCERPTS FROM SENTENCING STAGE JURY INSTRUCTIONS (EMPHASES ADDED)

Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be *unanimous* as to either form of punishment.

You have now heard all the evidence to be presented in the trial in the sentencing hearing of the case, including all the evidence as to whether there were any aggravating circumstances and whether there were any mitigating circumstances, all of which you will carefully weigh and consider.

No death penalty shall be imposed unless you *unanimously* find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:

(Trial Transcript, Vol. 14, pages 1989-1990.)

****

If the jury *unanimously* determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances *outweigh any mitigating* circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury, shall then complete the attached form entitled, quote: Punishment of Death; End quote.

The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found *outweigh any mitigating circumstances. Upon such unanimous finding*, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury *unanimously* determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury *unanimously* determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances *do not outweigh any mitigating circumstances*, the punishment shall be life imprisonment.

I further instruct you that, if the weight of the mitigating circumstances equals the weight of any or all aggravating circumstances you find to be true beyond a reasonable doubt, your verdict must be life. The members of the jury shall then complete the attached form entitled, quote: Punishment of Life Imprisonment; End quote.

By affixing there [sic] signatures thereto and returning the written verdict of the jury to the Court.

(Trial Transcript, Vol. 14, pages 1993-1995.)

****

You will be provided with two punishment forms for Count One of the indictment, one entitled, quote: Punishment of Death; End quote. And another entitled, quote: Punishment of Life Imprisonment; End quote.

You will complete the appropriate punishment form and each will sign it. The other punishment form is to be left incomplete and unsigned. These punishment forms are attached to these instructions.

You can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be *unanimous*.

(Trial Transcript, Vol. 14, pages 1995-1996.)

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const., amend VI

In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

U.S. Const., amend VII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend XIV, § 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

(2)

Supreme Court, U.S.
FILED
JUN 15 2001
CLERK

No. 00-1742

In The

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the court of appeals err in reversing the district court's grant of habeas corpus relief on a theory not relied on by the respondent?

2. Did the petitioner demonstrate that his attorney's deficient performance at the sentencing phase of his trial resulted in prejudice?

3. Could the jury instructions at the sentencing phase of petitioner's trial be reasonably understood to require juror unanimity on particular mitigating circumstances in violation of the Eighth Amendment?

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The opinion of the court of appeals (Pet. App. 1a-46a) is published at 226 F.3d 696. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 156a) is unpublished. The district court's opinion and final judgment granting the writ of habeas corpus and vacating petitioner's death sentence (Pet. App. 47a-98a) are published at 999 F.Supp. 1073.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2000, and petitioner's petition for rehearing with a suggestion for rehearing en banc was denied on December 22, 2000. Justice Stevens extended the time to file a petition for a writ of certiorari up to and including May 21, 2001. The petition was docketed on May 23, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In the early morning hours of February 18, 1986, Nashville, Tennessee, police discovered the body of Patrick Daniels at his duplex. He had been fatally stabbed. Norma Norman, the other resident, was found alive but with a butcher knife protruding from her back. The home appeared to have been ransacked, and pieces of duct tape were found strewn throughout the kitchen and living room.

On February 16, 1986, petitioner Abu-Ali Abdur'Rahman ("petitioner"), formerly James Lee Jones, had been introduced to Daniels at the duplex and bought a small amount of marijuana from him. Petitioner later told a friend, Harold Devalle Miller, that they should rob Daniels. Miller agreed to assist him, and petitioner concocted a plan whereby petitioner would enter Daniels' duplex under the pretext of making a drug purchase. Miller was then to force his way in and "rob" both Daniels and petitioner with a shotgun supplied by petitioner.

After the plan had to be abandoned when Miller became scared and was unable to carry out his part, petitioner formulated a second plan, to be executed the next evening. He told Miller he intended to stab the occupants of the duplex because shooting them would make too much noise.

On the night of February 17, petitioner armed himself with a shotgun, and Miller armed himself with an unloaded pistol. After obtaining some duct tape, they drove to the duplex. During the trip, petitioner related the specifics of the plan to Miller. Upon gaining entrance to the home under the pretext of purchasing some drugs, petitioner and Miller displayed their firearms and forced Daniels and Norman to lie on the floor. Petitioner bound them with duct tape about the hands, feet, eyes, and mouth. Petitioner then questioned Daniels as to where he kept his cocaine and his money. After stealing Daniels' bank card, petitioner forced Daniels to tell him the access code number to the bank account. Petitioner also searched the house and found some marijuana in the sofa cushions. After telling Daniels that he had been sent from

Chicago to "clean up everything" and that "you ain't been doing right and I'm here to teach you a lesson," petitioner procured a butcher knife from the kitchen and stabbed Daniels six times in the chest. Prior to and during the stabbing, Daniels was crying and begging petitioner not to hurt anyone. After Daniels ceased convulsing and lay motionless, petitioner turned to Norman and stabbed her in the back several times. While petitioner was stabbing Norman, Miller pulled him off and told him they should leave. Leaving the butcher knife sticking in Norman's back, the two men fled. In addition to the bank card and marijuana, the proceeds of the robbery included $300, which Norman testified was found missing from a box in her bedroom.

The following night, petitioner spoke with Miller about the crime and indicated that he could not understand how Norman had survived "after the licks" he had given her. Petitioner further stated that Norman was a strong woman and that "something had to be done about it." He suggested that they blow up the hospital wing where Norman was recuperating.

Petitioner was arrested on February 19. Miller fled the state and was not arrested until March 1987. Norma Norman positively identified petitioner and Miller from a photographic lineup. A search of petitioner's home produced the shotgun used in the commission of the crimes. The police also discovered that one of the tire tracks found at the crime scene was made by a tire from petitioner's vehicle.

In 1987, a Davidson County Criminal Court jury found petitioner guilty of first degree murder, assault

with intent to commit first degree murder with bodily injury, and armed robbery. At the sentencing phase of the trial, the State introduced evidence that petitioner had federal convictions of second degree murder in 1972 and assault with a dangerous weapon (knife) in 1970. Petitioner, who did not testify at the guilt phase, testified at the sentencing phase. He admitted to killing Daniels and stabbing Norman but denied any intent to kill them. He testified that he had become involved in a religious organization that espoused ridding the black community of social ills, particularly drug dealers. He testified that his intent had been to place so much "fear" in Daniels that he would no longer sell drugs. In addition to petitioner's testimony, the defense presented the testimony of petitioner's wife regarding his finances and religious affiliations.

The jury sentenced petitioner to death for first degree murder, finding three aggravating circumstances: the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, or kidnapping. The trial court sentenced petitioner to two consecutive life terms for the assault with intent to commit first degree murder with bodily injury and for armed robbery. The Tennessee Supreme Court affirmed the judgment, *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), and this

Court denied a petition for a writ of certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

2. In 1991 petitioner sought post-conviction relief in the state trial court, which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Crim.App., Feb. 23, 1995). The Tennessee Supreme Court denied review, and this Court denied a petition for a writ of certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

3. Petitioner filed this petition for a writ of habeas corpus in 1996, challenging both the convictions and sentences. The district court disposed of most of the claims by summary judgment but, over respondent's objections, conducted an evidentiary hearing on petitioner's claims of prosecutorial misconduct, trial counsel's conflict of interest, and ineffective assistance of trial counsel. On April 8, 1998, the district court denied the writ on petitioner's claims of prosecutorial misconduct, conflict of interest of trial counsel, and ineffective assistance of counsel at the guilt phase of the trial. However, the district court, relying almost exclusively on the evidence adduced at the federal evidentiary hearing, granted the writ and vacated petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase due to counsel's failure to present mitigating evidence. The district court stayed its judgment pending appeal.

The court of appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects, concluding that petitioner failed to

demonstrate prejudice resulting from trial counsel's performance at the sentencing phase. Bypassing respondent's argument that without the evidence at the federal evidentiary hearing petitioner had failed to demonstrate prejudice, the majority concluded that, "even considering the supplemental evidence heard by the district court and outlined in its opinion, petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance." (Pet. App. 20a)

ARGUMENT

1. Petitioner contends that the court of appeals' resolution of the "prejudice" issue on his claim of ineffective assistance of counsel at sentencing is irreconcilable with the principle that a party is deemed to have waived all arguments not expressly raised on appeal. He argues that, because respondent did not expressly brief or argue the point that prejudice was not proven even when the evidence at the federal evidentiary hearing was considered, the court of appeals was barred from relying on that conclusion to resolve the issue. However, petitioner has failed to demonstrate any reasons for granting review on this issue.

a. In the first place, the issue is not squarely presented by this case. The court of appeals recognized (and petitioner does not challenge it here) that "the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. (citation omitted) Instead, the additional evidence seems to merely supplement the factual

findings made by the post-conviction trial court." (Pet. App. 20a) Thus, presumably the court of appeals would have reached the same legal conclusion had it relied solely on the state court record. Furthermore, as respondent argued below, the court of appeals should have rested its prejudice analysis exclusively on the state court record because petitioner clearly had failed to show cause for his failure to develop the facts in the state court proceedings and actual prejudice resulting from that failure (or that a fundamental miscarriage of justice would have resulted from the district court's failure to hold an evidentiary hearing). *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992).

b. Petitioner's argument that the court of appeals' disposition in this case violated an immutable principle of appellate review of the Sixth Circuit is simply incorrect. Prior to the decision in this case, the court of appeals had firmly recognized that the waiver rule was not jurisdictional and that the court, in exceptional cases or to avoid a miscarriage of justice, could choose to entertain arguments not raised by the parties. *Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir. 1999); *Mayhew v. Allsup*, 166 F.3d 821, 823-24 (6th Cir. 1999). The instant case presented just such exception. To permit a district court's judgment vacating a state court's death sentence to stand, where the extant record clearly did not support a finding of prejudice, would have constituted a miscarriage of justice. And, to the extent that the decision below conflicts with Sixth Circuit precedent, such an intra-circuit conflict should be resolved by the Sixth Circuit and not by a grant of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

c. Petitioner's argument that there is a conflict among the circuits on this issue is incorrect. While *Demarest v. Price*, 130 F.3d 922 (10th Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992), *cert. denied*, 506 U.S. 904 (1992); *Rivera v. Director, Dep't of Corrections*, 915 F.2d 280 (7th Cir. 1990); and *Wilson v. O'Leary*, 895 F.2d 378 (7th Cir. 1990), all involve application of the waiver principle to bar review of an issue not raised by one of the parties, the cases merely reflect the exercise of the courts' discretion in the particular cases before them. None of the cases can fairly be read to stand for the proposition that a court of appeals has no discretion in the matter.

Petitioner's suggestion that *Boyd v. Thompson*, 147 F.3d 1124 (9th Cir. 1998); *Odum v. Boone*, 62 F.3d 327 (10th Cir. 1995); *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995); and *Lugo v. Keane*, 15 F.3d 29 (2d Cir. 1994), demonstrate that the court of appeals' decision is inconsistent with notice and an opportunity to be heard is misplaced. In each of those cases, the court addressed action by a district court terminating a petitioner's case *sua sponte* without notice and an opportunity to be heard. Petitioner, however, obviously was on notice that the court of appeals might well take into account the evidence at the federal evidentiary hearing in evaluating "prejudice" at the sentencing phase; the district court had relied on that evidence almost exclusively in concluding that prejudice had been shown.

d. Finally, contrary to petitioner's contention, the court of appeals' decision does not conflict with decisions of this Court. Indeed, in *United States v. Karo*, 468 U.S. 705 (1984), despite concluding that tainted evidence was used

in a search warrant affidavit, the Court, on its own initiative and without briefing by the parties, conducted a review of the record and overturned the suppression of the evidence, concluding that sufficient evidence existed beyond the tainted evidence to sustain the warrant. 468 U.S. at 719-21.

Lankford v. Idaho, 500 U.S. 110 (1991), relied on by petitioner, is clearly distinguishable. In *Lankford*, the Court held that Lankford's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty. The Court's holding rested on the premise that imposing the death penalty when the state did not seek it and the defendant had no notice that it could be imposed compromised the adversarial process essential to the truth-seeking function of a *trial* and, by close analogy, of a *capital sentencing proceeding*. 500 U.S. at 127. Obviously, the court of appeals, in reviewing the propriety of the grant of a writ of habeas corpus, was not performing the function of a trier of fact at a trial or sentencing hearing.

2. Like the state post-conviction trial and appellate courts, the court of appeals concluded that petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance:

> While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a

> history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death.

(Pet. App. 20a) Petitioner asks this Court to review the court of appeals' determination. However, petitioner has failed to demonstrate compelling reasons warranting review.

a. First, petitioner asserts that the court of appeals' decision conflicts with precedents from four other circuits. (Pet. 14-17) But the cases relied on fail to show any such conflicts. None of the cases can fairly be read for the proposition that, as a matter of law, prejudice from counsel's deficient performance is shown whenever counsel fails to investigate and offer evidence of mitigating circumstances – even when that evidence contains information likely to harm the defense. On the contrary, the conclusion in each case that prejudice was demonstrated simply rests on the application of the pertinent legal standard to the particular facts of the case. *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) ("We conclude that, in the unique circumstances of this case, [the attorney's] subminimum representation of [the petitioner] at the sentencing hearing may have been responsible for the death sentence . . . "); *Harris v. Dugger*, 874 F.2d 756, 764 (11th Cir. 1989) ("[O]n this record, we cannot conclude

that effective counsel would have made a strategic decision to forego testimony about [petitioner's] good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case"); *Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) ("We just cannot say with any degree of confidence that an objectively reasonable juror, confronted with this mitigating evidence, might not have reached the conclusion that [petitioner] lacked the requisite level of culpability to be punished with death"); *Pickens v. Lockhart*, 714 F.2d 1455, 1468 (8th Cir. 1983) ("We find that [petitioner] was actually and substantially prejudiced in the penalty phase of the case").

Nothing suggests that the court of appeals' decision in this case was inconsistent with the decisions of the Seventh, Fifth, Eleventh, and Eighth Circuits in those cases. Applying the correct legal standard of *Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("whether there is a reasonable probability that, absent the error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death"), to the facts of this case, the court of appeals simply concluded that petitioner did not suffer prejudice.

b. Petitioner contends that, contrary to *Williams v. Taylor*, 529 U.S. 362 (2000), the court of appeals applied the wrong standard in analyzing prejudice. (Pet. 17-20) However, in this regard petitioner has misread both *Williams* and the court of appeals' opinion.

Petitioner assumes that *Williams* created a new standard for analyzing prejudice in federal habeas corpus

proceedings: "whether the 'totality of the available mitigation evidence' would 'have influenced the jury's appraisal of [the defendant's] moral culpability.' " (Pet. 17-18) But a plain reading of *Williams* demonstrates that the Court did not supplant the *Strickland* standard, but reaffirmed it. *Williams*, 529 U.S. at 391 ("To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' ") (quoting *Strickland*, 466 U.S. at 694).

Furthermore, in *Williams* this Court determined that the Virginia Supreme Court's decision – that the petitioner suffered no prejudice from counsel's failure to present mitigating evidence at sentencing – was "an unreasonable application" of federal law under 28 U.S.C. § 2254(d)(1) because, *inter alia*, the *state court* had "failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [state] habeas proceeding – in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98 (emphasis added). Clearly, the language in *Williams* seized upon by petitioner pertains only to the reweighing of aggravating and mitigating circumstances by a state court – not the prejudice analysis performed by the court of appeals on collateral review in this case. Indeed, it would have been inappropriate for the court of appeals to have "reweighed" aggravating and mitigating circumstances. *See Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (reweighing "hardly appropriate in the course of collateral review by a federal

court"). Therefore, *Williams* does not support petitioner's argument that the court of appeals incorrectly applied *Strickland*'s prejudice prong.

In any event, it is abundantly clear that the court of appeals considered all of the available mitigation evidence in determining whether petitioner was prejudiced by counsel's deficient performance. After concluding that petitioner did not suffer prejudice, the opinion plainly states: "We reach this conclusion *even considering the evidence presented at the evidentiary hearing below.*" (Pet. App. 19a) (emphasis added). In the succeeding paragraph, the opinion reiterates the point: "*Even considering the supplemental evidence heard by the district court and outlined in its opinion,* petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance." (Pet. App. 20a) (emphasis added). The court of appeals neither misapplied *Williams* nor evaluated the mitigating evidence improperly.

c. Petitioner mistakenly contends that the court of appeals' prejudice analysis was flawed because, in evaluating the likely effect of counsel's deficient performance upon the balance of aggravating and mitigating circumstances, the panel majority included the "heinous, atrocious or cruel" aggravating circumstance, the jury instructions for which it found unconstitutionally vague. (Pet. 20-22) In the first place, the panel majority did not find the jury instruction on the "heinous, atrocious or cruel" aggravator unconstitutionally vague. The court specifically declined to pass on the constitutional question because it found any error in the instruction harmless. (Pet. App. 22a-24a)

Second, petitioner proceeds on the erroneous premise that the instruction ("the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind") was unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 364-65 (1988) (aggravating circumstance of "especially heinous, atrocious or cruel" passes constitutional muster when it applies to murder involving "some kind of torture or serious abuse"). Furthermore, even assuming that the instruction was infirm, the Tennessee Supreme Court cured the error by applying a narrowing construction of the aggravating circumstance. *See Godfrey v. Georgia*, 466 U.S. 420, 431-32 (1980) (narrowing construction by state supreme court would have cured vagueness of aggravator). By finding that the evidence was sufficient to support the "heinous, atrocious or cruel" aggravator, *State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990), the state court presumably applied its narrowing construction previously adopted in *State v. Williams*, 690 S.W.2d 517, 529-30 (1985) (defining "torture" as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious" and providing examples of acts evincing "depravity of mind"). *See Arave v. Creech*, 507 U.S. 463, 471 (1993) (presumption that state court knew and applied existing narrowing construction).

In any event, nothing in the panel majority's opinion suggests that the majority in fact included the "heinous, atrocious or cruel" aggravator in its prejudice analysis. The court merely concluded that petitioner did not suffer prejudice sufficient to create a reasonable probability that

the sentencing jury would have concluded that "the balance of aggravating and mitigating factors" did not warrant death. (Pet. App. 19a, 20a) Judge Batchelder concurred in Judge Siler's opinion for the court. (Pet. App. 31a) The fact that, in the course of her concurring opinion, there is included a quote from the state trial court's opinion referring to the effect of *three* aggravating circumstances is of no legal consequence.

d. Petitioner contends that the court of appeals' decision is inconsistent with *Williams* because the court below characterized the evidence of petitioner's prior violent criminal behavior as "harmful." (Pet. 22-24) Seizing upon language in *Williams* characterizing the evidence of Williams' prior criminal history as "consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation," 529 U.S. at 398, petitioner leaps to the illogical conclusion that *Williams* requires courts to view prior violent criminal behavior as "mitigating" in all cases. But *Williams* did not create such a per se rule. Rather, this Court merely observed that in Williams' case his criminal history could have been viewed by the sentencing jury in that light.

Williams does not preclude a court from taking into account the obvious harmful effects of a petitioner's criminal history in analyzing prejudice from counsel's failure to introduce such evidence, but only from failing to evaluate "the totality of the available mitigation evidence." 529 U.S. at 396-97. And, as discussed above, nothing in the court of appeals' decision in this case suggests that the court failed to view the mitigation evidence in its "totality."

Petitioner's assertions that the evidence of his violent criminal history was inadmissible and cumulative are incorrect. Both the state courts and the district court implicitly recognized that the introduction of petitioner's records would have opened the door for the prosecution to introduce the criminal history evidence at the penalty phase.[1] (Pet. App. 18a-19a (quoting Court of Criminal Appeals), 95a-96a) The "harmful evidence" to which the state courts referred included, *inter alia*, evidence that petitioner suffered only from a personality disorder rather than a mental illness; that he was convicted of assault at age of 15 and two more assaults at the age of 19; that while in prison he received numerous citations for misconduct, including possession of a knife; that he threatened his junior high school teachers with a knife; and that he was discharged from the military under less than honorable conditions. (Pet. App. 95a-96a) This evidence would have been more than cumulative of the fact of the convictions introduced by the State to prove the prior violent felony aggravating circumstance.

e. Petitioner contends that in analyzing prejudice the court of appeals failed to account for the ability of a single juror to impose a life sentence. (Pet. 24-25) However, contrary to petitioner's contention, this case does not squarely present the issue. The court of appeals did

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[1] Petitioner's reliance on *Carter v. Bell*, 218 F.3d 581, 589 (6th Cir. 2000), is misplaced. In *Carter*, the court of appeals determined that the evidence of Carter's criminal background and violent history would not have been relevant to explain or controvert the particular mitigating factors in Carter's case. But here the state courts found that the negative evidence could have been introduced.

not specifically address the potential effect of the omitted evidence upon a single juror, and nothing in the opinion below suggests that the court either adopted or rejected petitioner's argument here that prejudice can be established if one hypothetical juror might have been swayed by a piece of mitigating evidence.

f. Finally, petitioner contends that in analyzing prejudice the court of appeals failed to account for counsel's failure to introduce *any* mitigating evidence. (Pet. 25-26) But petitioner's argument is based on an assertion of fact not supported by the record. The sentencing jury heard two witnesses for the defense, petitioner and his wife. Petitioner testified concerning his relationship with a religious organization and his account of events surrounding the stabbings. (Pet. App. 94a) In addition, petitioner did not deny responsibility for the homicide and assault but endeavored to mitigate the circumstances of the offenses by testifying that he suffered from a memory lapse, *State v. Jones*, 789 S.W.2d at 552, and by making a plea for his life. (Pet. App. 94a) Petitioner's wife testified regarding their finances. (*Id.*)

While this strategy ultimately proved unsuccessful, the record does not support petitioner's assertion that counsel wholly failed to introduce any mitigating evidence. Thus, contrary to petitioner's argument, this case does not squarely present the prejudice issue where the jury was provided with no reasons to spare petitioner's life.

3.a. Petitioner contends that a reasonable juror could have read the jury instructions at the sentencing phase of his trial as requiring a unanimous finding of

mitigating circumstances in violation of *Mills v. Maryland*, 486 U.S. 356 (1988). In *Mills*, the relevant portion of the jury verdict form read as follows:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

486 U.S. at 387 (emphasis omitted). This Court held that these sentencing instructions were constitutionally invalid because they created a substantial likelihood that reasonable jurors might think that they were precluded from considering any mitigating evidence in the absence of unanimity. 486 U.S. at 384.

But, as the court of appeals correctly determined, petitioner's jury instructions contained no such infirmity. Petitioner's sentencing jury was instructed, in pertinent part:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:

* * *

In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:

* * *

If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death.

* * *

The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

* * *

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

(Pet. App. 152a-153a) (emphasis omitted). These instructions require unanimity as to the results of the *weighing* of aggravating and mitigating circumstances, but that is a far different matter than requiring unanimity as to the *presence* of a mitigating circumstance.

The legal standard for reviewing jury instructions claimed to restrict consideration of mitigating circumstances is "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990) (emphasis added). "A capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition." *Id.* (emphasis added). Petitioner cannot demonstrate a "reasonable likelihood" that the instructions at sentencing were unconstitutionally applied in violation of *Mills*; the actual language of the instructions simply will not permit it. In order to sustain petitioner's claim, one would have to assume that the jurors ignored the text of the instructions and superimposed a unanimity requirement for particular circumstances – a requirement conspicuously absent from the instructions actually given. But "[t]he 'rule' – indeed, the premise, upon which the system of jury trials functions under the American judicial system – is that juries can be trusted to follow the trial court's instructions." *Parker v. Randolph*, 442 U.S. 62, 75 n.7 (1979). "The

Court presumes that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985).

b. Petitioner's reliance on *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911 (1998), and *Kubat v. Theriet*, 867 F.2d 351 (7th Cir. 1989), *cert. denied sub nom. Kubat v. Greer*, 493 U.S. 874 (1989), to demonstrate a conflict among the federal circuits is misplaced. In *Frey*, the jury was told in part: " . . . the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances," suggesting the need for jury unanimity as to both its ultimate and interim conclusions. 132 F.3d at 922-23. In *Kubat*, the jury was told in part: "If . . . you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence, you should sign the form which so indicates," clearly suggesting that a particular mitigating factor required unanimity. 867 F.3d at 369. In both cases the sentencing jury could have reasonably understood its instructions to require unanimity in consideration of mitigating evidence. That is not so in petitioner's case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

1. In *Penry* v. *Johnson*, No. 00-6677 (June 4, 2001) (*Penry II*), this Court held that the instructions given to the jury at the defendant's resentencing hearing (at which he was again sentenced to death) were constitutionally inadequate – despite the use of a supplemental instruction regarding mitigating evidence – because the jury was unable "to make a reasoned moral response to Penry's mitigating evidence." *Id.*, slip op. at 16. The Court's holding in *Penry II* is not directly implicated here, but it is based on a principle of substantial relevance to this case: the importance in the capital sentencing process of the jurors' sense of a defendant's moral culpability. Specifically, the Court emphasized in *Penry II* that "it is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence." *Id.*, slip op. at 13 (alteration in original; citations and internal quotation marks omitted).

The principle that the sentencer's sense of a defendant's moral culpability is an essential element in determining whether to impose the death penalty has been consistently reflected in this Court's precedents. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), this Court explained that

> punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The Court's holding in *Penry I* relied on earlier cases such as *Lockett* v. *Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). In *Lockett*, the Court found Ohio's death penalty statute to be unconstitutional when it limited consideration of mitigating evidence to three statutory factors. 438 U.S. at 604-05. The *Lockett* plurality explained that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. In *Eddings*, the Court invalidated the defendant's death sentence on the ground that the sentencing judge had failed to consider mitigating evidence regarding the defendant's troubled family history and emotional disorders. The Court emphasized that although the sentencer "may determine the weight to be given relevant mitigating evidence," it "may not give it no weight by excluding such evidence from [its] consideration." 455 U.S. at 114-15.

In cases since *Penry I*, this Court has repeatedly reiterated its holding that punishment should be related to a defendant's moral culpability, such that the sentencer must be allowed to consider and give effect to relevant mitigating evidence. See, *e.g.*, *McKoy* v. *North Carolina*, 494 U.S. 433, 443 (1990); *Boyde* v. *California*, 494 U.S. 370, 381-82 (1990); *Saffle* v. *Parks*, 494 U.S. 484, 492-93 (1990). As discussed at length in the Petition for Certiorari, see Pet. for Cert. 17-18, this Court squarely addressed this issue last Term in *Williams* v. *Taylor*, 529 U.S. 362 (2000), in which it reversed the Virginia Supreme Court's finding that petitioner had not been prejudiced by the ineffective assistance of his counsel. 529 U.S. at 398. The Court explained in *Williams* that although the mitigating evidence presented by the defendant's trial counsel regarding the defendant's remorse and cooperation with law enforcement officials may not have

overcome a finding of aggravating circumstances regarding future dangerousness, "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability. * * * Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398 (citing *Boyde* v. *California*, 494 U.S. 370, 387 (1990)).

2. In this case, in reaching its conclusion that petitioner was prejudiced by his counsel's failure to present any mitigating evidence, the district court made clear that it relied on the standard set forth by this Court in *Penry I*.[1] Notwithstanding the district court's accurate and explicit identification of this standard, the Sixth Circuit nonetheless failed to acknowledge – much less follow – *Penry I* and its progeny. Instead, the Sixth Circuit considered only the "balance" between mitigating and aggravating factors,

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[1] The district court noted:

> Mitigating evidence relevant to the selection decision includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Pet. App. 87a.

concluding that "because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death." Pet. Supp. 20a.

The court of appeals' narrow focus on the "balance" of aggravating and mitigating factors is inconsistent with this Court's precedents and completely ignores how jurors would have treated the evidence – that is, in determining whether to impose the death penalty, jurors would not simply have balanced aggravating and mitigating factors, but rather would have considered the mitigating evidence as it bore on petitioner's moral culpability. As this Court noted in *Penry I*, confirmed in *Williams* v. *Taylor*, and most recently reaffirmed in *Penry II* after the filing of the petition for certiorari in this case, mitigating evidence regarding a defendant's background and character may influence the jury's assessment of that defendant's moral culpability, *Penry I*, 492 U.S. at 319; *Williams*, 529 U.S. at 398, and "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," *Williams*, 529 U.S. at 398. The Sixth Circuit's failure to follow the standard outlined by this Court in *Penry I* was particularly egregious insofar as it disregarded entirely large amounts of mitigating evidence found by the district court – for example, evidence regarding the horrific physical and emotional abuse suffered by petitioner as a child, petitioner's own mental illness as well as his dysfunctional family history arising from mental illness, and petitioner's good character and contributions to society.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF LAW PROFESSORS LAURENCE H. TRIBE, JAMES S. LIEBMAN, DAVID COLE, PAMELA S. KARLAN, AND HERMAN SCHWARTZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] the undersigned law professors submit this brief as amici curiae in support of the petition for writ of certiorari. Amici are teachers and students of constitutional and/or criminal law. They are Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School; James S. Liebman, Simon H. Rifkind Professor of Law, Columbia Law School; David Cole, Professor of Law, Georgetown University Law Center; Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School; and Herman Schwartz, Professor of Law, Washington College of Law, American University.

Amici have an interest in this case because it raises a fundamental issue of fairness regarding the administration of criminal justice and capital punishment in this country. In particular, the Sixth Circuit's decision in this case sends a man to his death without affording him the opportunity to address the factual or legal rationale underlying the court's decision. No system of capital punishment can be counted on to produce fair and reliable outcomes employing such unfair procedures. Only this Court's review can provide a remedy.

SUMMARY OF THE ARGUMENT

This case implicates the fundamental right of a capital habeas petitioner who has been granted relief from a sentence of death by a district court to be apprised of the issues that a court of appeals plans to consider on review of the district court's decision. In the present case, the Sixth Circuit rein-

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[1] A copy of Respondent's written consent is filed herewith. Petitioner's consent has been filed separately with the Clerk of the Court. Pursuant to Rule 37.6, counsel for amici curiae certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, has made a monetary contribution to this brief's preparation or submission.

stated Petitioner's death sentence on a ground *abandoned* by the State on appeal and raised *sua sponte* by the Sixth Circuit without according Petitioner notice or an opportunity to be heard on that very issue. Petitioner's right not to be deprived of his life without due process of law and his right to be free from cruel and unusual punishment now hang in the balance.

On petition for writ of habeas corpus, the District Court held an evidentiary hearing to determine whether Petitioner had received at trial the constitutionally mandated minimum level of representation by counsel and, if not, whether Petitioner had been prejudiced by his counsel's ineffectiveness. At the hearing, Petitioner introduced voluminous evidence showing that at sentencing, despite the existence of significant and compelling mitigating evidence, Petitioner's trial counsel inexplicably had presented no mitigating evidence whatsoever. Based on the evidence developed at the evidentiary hearing, the District Court found (1) that Petitioner had received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that Petitioner had been prejudiced by his counsel's ineffectiveness because there was a reasonable probability that Petitioner would not have been sentenced to death had his trial counsel introduced the mitigating evidence that existed. The District Court accordingly vacated Petitioner's death sentence.

In the face of the powerful mitigation evidence introduced at the evidentiary hearing, the State on appeal in the Sixth Circuit did not even attempt to challenge the District Court's ruling that Petitioner's trial counsel had been ineffective. Nor did the State attempt to question the District Court's ruling that the evidence introduced at the evidentiary hearing demonstrated prejudice. Instead, the State chose simply to challenge the procedural legitimacy of the evidentiary hearing and to argue that, *absent the evidence developed at the evidentiary hearing*, Petitioner could not demonstrate prejudice from his trial counsel's ineffectiveness. Accordingly, the sole issues raised by the State's appeal were (1) whether the District

Court had authority to conduct the evidentiary hearing in the first place, and (2) whether, without the evidence adduced at the evidentiary hearing, Petitioner could demonstrate prejudice from his counsel's ineffectiveness.

Under Sixth Circuit precedent, issues not raised on appeal are deemed abandoned, and the Sixth Circuit has a well-established practice of not considering such abandoned issues other than in "exceptional" cases where it "would constitute a miscarriage of justice" not to address those issues—a circumstance not present where, as here, the State itself makes a tactical choice not to pursue a ground for appeal on habeas. In reasonable reliance on such Sixth Circuit precedent, Petitioner confined his arguments in opposition to the State's appeal in the Sixth Circuit to the two issues raised by the State. Petitioner did not address in his brief issues that had not been raised and which therefore, as a matter of Sixth Circuit precedent, were to be deemed abandoned. Petitioner accordingly defended the propriety of the evidentiary hearing and argued alternatively that even without the evidence adduced at the federal hearing Petitioner was clearly prejudiced by his counsel's ineffective assistance. Petitioner did not address the District Court's findings regarding the evidence introduced at the evidentiary hearing, nor the District Court's ruling that the evidence adduced at the federal evidentiary hearing demonstrated that there had been ineffective assistance of counsel resulting in prejudice.

At oral argument before the Sixth Circuit, Petitioner's counsel stated that it was undisputed that the evidence introduced at the federal evidentiary hearing demonstrated ineffective assistance of counsel and resulting prejudice. Neither the Sixth Circuit nor the State's counsel challenged this contention. Indeed, consistent with the rule that issues not raised on appeal are deemed abandoned, the Sixth Circuit circumscribed oral argument on the State's appeal to the two issues the State had presented. After the oral argument, the Sixth Circuit did not request supplemental briefing or argument. In

particular it sought no briefing or argument regarding whether, if the District Court's evidentiary hearing were proper, the evidence introduced at the evidentiary hearing demonstrated that Petitioner had been prejudiced by his counsel's ineffective assistance.

The Sixth Circuit affirmed the District Court's authority to conduct the evidentiary hearing. Astonishingly, however, the Sixth Circuit *sua sponte*—without notice to any of the parties and without the benefit of any argument by counsel on the issue—reversed the District Court's ruling that had vacated Petitioner's death sentence, on a ground entirely different from any raised by the State in its appeal. The Sixth Circuit determined that the evidence presented at the federal habeas hearing failed to support a finding of prejudice—notwithstanding that the State had not even bothered to make an argument in support of such a ruling. The Sixth Circuit identified no exceptional circumstances or miscarriage of justice that required it to address the issue that the State had abandoned on appeal, and nothing short of clairvoyance would have enabled Petitioner to anticipate that the Sixth Circuit's ruling might be based on an issue that had been neither briefed nor addressed in oral argument by the parties or the Court.

The essence of the due process guarantee is that a person may not be deprived of life, liberty, or property without notice and an opportunity to present arguments on the issues to be decided. Notice must include not only information that a hearing is about to occur, but information as to what the hearing will entail and what issues may be adjudicated. A meaningful opportunity to be heard in the habeas context must provide the petitioner some reasonable opportunity to present the reviewing court with not only the facts relevant to his petition, but also the legal argument and authorities on which the petition may be decided. A habeas petitioner's right to an opportunity to be heard by the reviewing court cannot be satisfied simply because that court has before it all

of the evidence in the record—particularly where the petitioner is opposing a state's efforts to have a death sentence reinstated. Rather, fairness demands that the petitioner have an opportunity to present argument and authority that would guide the Court through the record and any legal issues that may be dispositive of the petition.

The importance of meaningful notice and opportunity to present arguments is particularly strong where the petitioner's life hangs in the balance, especially where, as here, a district court has determined that the petitioner's death sentence was unconstitutionally imposed. This Court has consistently held that decisions concerning imposition of the death penalty must afford the defendant notice of the crucial issues under consideration and an opportunity to rebut the arguments arrayed against him. Thus, where a habeas court determines the validity of a capital sentence—and particularly where, as here, an appellate court reinstates a capital sentence that had been vacated below—fundamental fairness demands that the petitioner have meaningful notice and the opportunity to oppose the arguments against him.

Petitioner has demonstrated the existence of conflicts among the circuits regarding the important issues in this case. Even were this Court to conclude that there is no circuit conflict that might independently warrant certiorari review, however, the egregious failure of the Sixth Circuit to provide Petitioner fair notice and an opportunity to be heard on the issue that proved decisive of his efforts to obtain federal relief from an unconstitutionally imposed sentence of death "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a).

Accordingly, the petition for writ of certiorari should be granted.

ARGUMENT

Certiorari Should Be Granted To Review The Sixth Circuit's Decision, Which Reinstated Petitioner's Death Sentence Without Offering Petitioner Notice And An Opportunity To Be Heard On The Very Issue On Which The Sixth Circuit Based Its Ruling.

An essential element of the due process guarantee of the United States Constitution is that a person may not be deprived of life, liberty, or property without notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). A goal of such constitutionally guaranteed procedural fairness is to "prevent unfair and mistaken deprivations" of entitlements conferred by law. *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972); *see also Mathews v. Eldridge,* 424 U.S. 319, 335, 343 (1976) (factors in due process analysis include risk of erroneous deprivation and reliability of existing procedures). Notice must include not only information that a hearing is about to occur, but information as to what the hearing will entail. *See, e.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) (Marshall, J., announcing judgment, joined by Blackmun, Powell, and O'Connor, JJ.); *accord, id.* at 269 (Brennan, J., concurring in part and dissenting in part); *id.* at 273-74 (Stevens, J., dissenting in part). Notice must be of a type "reasonably calculated to apprise" an interested party of the issue to be adjudicated. *See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) .

Even when only liberty and not life is at stake, a court may not make crucial decisions in a black box without input from the affected party. "The opportunity to present reasons, either

in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Loudermill*, 470 U.S. at 546; *see also Burns v. United States*, 501 U.S. 129, 138 (1991) (sentencing court may not depart upward from guidelines without first notifying parties that it intends to depart). The opportunity for counsel to present legal and factual arguments to a court is critical to the reliability of judicial decision making. Where "only [a] barren record speaks for the indigent . . . he is forced to go without a champion on appeal," and "[a]ny real chance he may have of showing that his appeal has hidden merit is deprived him." *Douglas v. California*, 372 U.S. 353, 356 (1963) (recognizing right to counsel for indigent defendants in direct appeal of criminal convictions).

In capital cases, the need for procedural protections for indigent defendants is even stronger than it is in non-capital cases. This Court has consistently held that decisions concerning imposition of the death penalty must afford the defendant notice of the crucial issues under consideration and an opportunity to rebut the facts and arguments arrayed against him. *See Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (defendant's due process right to be heard requires that he be afforded an opportunity to rebut the argument justifying a death sentence); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (imposition of death sentence without notice to defendant that death penalty was under consideration at sentencing hearing violated due process); *Skipper v. South Carolina*, 476 U.S. 1, 9 (1986) (three justices concurred in vacation of death sentence because petitioner "was not allowed to rebut evidence and argument used against him"); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (imposition of death sentence violated due process when imposed in part on basis of confidential information that defendant had no chance to rebut).

By statute, capital defendants have a right to counsel on appeal in federal habeas corpus proceedings. *See* 21 U.S.C. § 848(q)(4)-(9). That right would be rendered meaningless if

appellate courts were free to reverse district courts' grants of habeas relief without giving counsel for habeas petitioners notice of the grounds on which such reversal were possible and an opportunity to be heard on such possible grounds. Even where the federal Constitution provides no right of access to appellate review, any appellate review provided by the government must be administered with fair, nondiscriminatory procedures. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Sixth Circuit's action in this case does not satisfy that minimal constitutional requirement.

Courts other than the Sixth Circuit have held in habeas proceedings—even non-capital ones—that in the context of a court's *sua sponte* consideration of an issue not raised by the parties, fairness requires notice to and an opportunity to be heard by the party to be affected. *See Magouirk v. Phillips*, 144 F.3d 348, 359 (CA5 1998) (when a federal district court raises procedural default *sua sponte*, failure to provide the habeas petitioner with notice and a reasonable opportunity to present argument against dismissal may constitute an abuse of discretion); *Esslinger v. Davis*, 44 F.3d 1515, 1528 (CA11 1995) ("[W]e think it fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default."); *id.* at 1528 n. 45 ("If the petitioner is to be afforded due process, he must receive notice of the court's inclination to interpose the default, an opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present his evidence."); *Williams v. Whitley*, 994 F.2d 226, 232 (CA5 1993) (a district court may raise *sua sponte* abuse of the habeas writ provided that the petitioner is afforded an adequate opportunity to explain why his petition should not be barred as successive or abusive); *United States v. Fallon*, 992 F.2d 212, 213 (CA8 1993) (district court may raise abuse of writ *sua sponte* as long as the petitioner is given adequate opportunity to respond); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (CA10 1992) ("Prior to dismissing

an action sua sponte, a court must give the complainant an opportunity to respond to the argument for dismissal."); *see also Washington v. James*, 996 F.2d 1442, 1444 (CA2 1993) (requiring additional briefing when procedural default raised *sua sponte* on appeal).

This Court has also expressed concern, in the context of habeas corpus proceedings, regarding the unfairness that can result when an appellate court raises an issue *sua sponte* and decides a case on that basis without offering the parties notice or an opportunity to be heard on that issue. *See Trest v. Cain*, 522 U.S. 87, 92 (1997) (vacating ruling of court of appeals, which had determined, *sua sponte*, and without providing the parties the opportunity for further briefing, that a procedural default barred petitioner's federal habeas claim). As this Court stated in *Trest* with reference to the benefits of offering the parties an opportunity to provide briefing on questions that a court raises *sua sponte*, "often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home." *Id.; cf. Granberry v. Greer*, 481 U.S. 129, 132 & n. 6 (1987) (recognizing need for procedural fairness in habeas context where state raises argument of non-exhaustion of state court remedies for the first time on appeal).

Here, the Sixth Circuit afforded Petitioner no opportunity to guide the panel through the District Court record in order to avoid a mistaken re-imposition of a sentence of death. In Petitioner's brief before the Sixth Circuit, Petitioner's counsel reasonably chose not to offer argument or authority to demonstrate that the District Court had correctly concluded that the evidence before it established that Petitioner was prejudiced by his counsel's ineffectiveness because there was no reason for Petitioner to offer such argument. The State's attorney had made a conscious decision to abandon a principal argument below (that the federal court evidentiary record did not establish prejudice). Instead, the State had framed the issue on appeal to be whether "*[w]ithout the evidence at the federal evidentiary hearing*, . . . the petitioner demonstrate[d]

prejudice from trial counsel's deficient performance." Br. of Respondent-Appellant 3 (CA6, Nos. 98-6568, 98-6569) (emphasis added). A premise of our adversarial system is that when an appellant abandons an issue on appeal, the appellee accepts the concession and does not burden the appeals court with superfluous argument on points not raised.

At oral argument, Petitioner's counsel expressly relied on the State's narrow framing of its appeal and chose not to address the question whether the District Court's finding of prejudice based on the evidence at the federal habeas hearing was correct. Petitioner's counsel prefaced his argument by stating his understanding that "it is not in dispute, not disputed by the state that the merits of the district court decision concerning whether the petitioner was prejudiced by ineffective assistance of counsel was correct." Trans. of Oral Arg. 14-15. Neither the State's counsel nor the Sixth Circuit so much as suggested at any time during oral argument that Petitioner's understanding of the State's appeal was incorrect. Petitioner's counsel proceeded to devote his oral argument to the question whether the District Court had authority to expand the factual record by conducting an evidentiary hearing.

Petitioner's decision not to present to the Sixth Circuit either argument or authority regarding the evidence adduced at the federal hearing was sound given Sixth Circuit precedent establishing that arguments not expressly raised on appeal in habeas cases are deemed abandoned. Sixth Circuit precedent clearly embraced the practice of not considering any such abandoned arguments. *See, e.g., McMurphy v. City of Flushing*, 802 F.2d 191, 198-99 (CA6 1986); *Mitchell* v. *Myers*, No. 96-6214, 1998 U.S. App. LEXIS 17897, at *2-*3 (CA6 July 31, 1998); *Mathis* v. *Dutton*, No. 94-5511, 1995 U.S. App. LEXIS 2922, at *2 (CA6 Feb. 10, 1995); *Gray* v. *Tennessee*, No. 94-5346, 1994 U.S. App. LEXIS 30156, at *3 (CA6 Oct. 18, 1994); *Hunt* v. *Mills*, No. 92-5695, 1993 U.S. App. LEXIS 6913, at *2 (CA6 Mar. 24, 1993). Sixth Circuit precedent established that only in "exceptional" cases where it

"would constitute a miscarriage of justice" not to consider an abandoned argument would that court give consideration to such an argument. *See Dorris v. Absher,* 179 F.3d 420, 425-26 (CA6 1999) (deciding issue not raised below where district court's ruling was based on an erroneous interpretation of statute and disproportionate damages had been awarded against defendant). There is no reason why Petitioner or his counsel should have suspected that it would constitute a miscarriage of justice for the Sixth Circuit to accede to the State's conscious decision not to challenge the District Court's ruling that the evidence introduced at the federal hearing established that Petitioner was prejudiced by his counsel's ineffectiveness. Indeed, the Sixth Circuit's opinion offers no justification for deciding the issue that had not been addressed by the parties, and there is no legal presumption applicable here that might suggest that the State should not have been deemed to have waived the argument that Petitioner had not demonstrated prejudice in the District Court proceeding. Moreover, the question that proved to be dispositive to the Sixth Circuit in this case—whether Petitioner suffered prejudice from his counsel's ineffectiveness—raises none of the comity or federalism concerns that have led some courts in the habeas context to raise questions *sua sponte*. *Cf. Granberry*, 481 U.S. at 133-34 (addressing issue of exhaustion of state court remedies).

The choice by Petitioner's counsel to focus on the issues that the State had raised in its appeal was not only wise based on Sixth Circuit precedent, but also consistent with fundamental principles of appellate advocacy endorsed by this Court. Justice Jackson famously observed that "[o]ne of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally," for "[l]egal contentions, like the currency, depreciate through over-use." *Jones v. Barnes*, 463 U.S. 745, 752 (1983) (quoting Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)). As this Court explained in

Jones with respect to appellate argument, "[e]xperienced advocates since time beyond memory have emphasized the importance of . . . focusing on one central issue if possible, or at most on a few key issues." 463 U.S. at 751-52. The Court in *Jones* noted the importance of economy of argument notwithstanding its recognition that points not argued by a criminal defendant on appeal could be forfeited. The same rules should presumably apply to the State, and it would be perverse to penalize *Petitioner* here for limiting his arguments in opposition to the State's appeal to those issues to which the State had, for tactical reasons, restricted its appeal.

Furthermore, although, as noted by the Petitioner, the Circuit Courts of Appeals have not uniformly applied waiver principles in habeas corpus cases, Pet. 9, the Petitioner in the present case had no reason to anticipate that the Sixth Circuit would excuse the State's failure to raise a potentially dispositive issue without giving the Petitioner any opportunity to address that substantive issue or the antecedent question whether any abandonment by the State of that substantive issue should be overlooked.[2] This Court has made clear that the due process requirement includes the notion that courts should not change their own rules in the middle of the game where the effect would be to deny a litigant an opportunity to be heard. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due pro-

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[2] The Respondent's decision not even to attempt to appeal the ruling that Petitioner was prejudiced in light of the evidence adduced in the federal habeas hearing speaks volumes about the strength of Petitioner's ineffective assistance claim on the merits, the correctness of the District Court's decision, and the gravity of the Sixth Circuit's disposition of the issue without giving Petitioner notice and an opportunity to be heard.

cess of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'") (citation omitted).

The importance of legal argument from the parties could not be clearer than in the Sixth Circuit's opinion in this case, for that opinion in no way suggests any awareness by the panel of the issues implicated by its *sua sponte* consideration of the question whether the *Strickland* prejudice prong was satisfied in light of the evidence introduced in the federal District Court. Petitioner could not have anticipated the Sixth Circuit's reasoning on this issue, as the panel did not so much as hint during oral argument that it was considering an issue not raised by the State on appeal.[3]

The opportunity to be heard that is central to the federal due process guarantee includes the opportunity not only to present facts, but to present legal argument and to point the decision maker to relevant legal authority. This Court has repeatedly recognized that, both for courts and litigants, the presentation of legal argument is essential for reliable adjudication. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 1051 (2001) (explaining that "proper exercise of the judicial power" depends upon "the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case"). For

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[3] Furthermore, although Petitioner sought rehearing on the ground that it was improper for the Sixth Circuit to reach the issue *sua sponte* without any argument by the parties, the Sixth Circuit denied rehearing, and Petitioner never obtained an audience before that court on the merits of the District Court's decision that the evidence adduced at the federal evidentiary hearing showed that Petitioner was prejudiced by his counsel's ineffectiveness. In any event, rehearing is an extraordinary remedy—rarely granted and requiring a court to reconsider a ruling already issued—that cannot suffice to provide what is recognized as the most ordinary, and fundamental, demand of due process—namely, an opportunity to precede deliberation with argument.

example, in explaining the scope of exhaustion requirements in the federal habeas context, this Court has emphasized and relied upon the central importance that presentation of legal argument in addition to presentation of legal facts enjoys. In holding in *Picard v. Connor*, 404 U.S. 270 (1971), that the substance of a federal habeas corpus claim must be fairly presented in the first instance to the state courts, the Court observed that although "[t]o be sure, respondent presented all the facts" to the state court, the respondent, by failing to present argument in state court regarding a constitutional claim, had failed to give the state court "'an opportunity to apply controlling legal principles to the facts bearing upon'" that claim. *Id.* at 277 (citation omitted); *cf. Quong Wing v. Kirkendall*, 223 U.S. 59, 63-64 (1912) (Holmes, J.) ("[E]ven if, when called to our attention, the facts should be taken notice of judicially . . . still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps . . . .") (citations omitted).

Similarly, a habeas petitioner has not been afforded an opportunity to be heard by a reviewing court simply because the reviewing court states that it has considered all the evidence in the record—particularly where the reviewing court is not affirming the decision below, whether on the same or new grounds, but is instead reversing a district court's ruling in favor of a petitioner. Rather, fair play requires that the petitioner be given an opportunity to present argument and controlling legal authority on any issues that might be dispositive of his petition, especially where the appellate court is considering whether to reverse a district court's decision to vacate a death sentence. Were it otherwise, given the *de novo* review that *Strickland* requires an appellate court to exercise, *see* 466 U.S. at 698, an appellate court would never be required to entertain written or oral argument on a *Strickland* claim on habeas provided that it reviewed all of the evidence in the record. In any event, bad as it would be for appellate courts to

dispense with briefing and oral argument in such situations, it is even worse for an appellate court to entertain briefing and argument and then go off on its own as the Sixth Circuit did here. The Sixth Circuit's approach makes the expectations reasonably generated by the practices of briefing and argument merely "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California,* 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Had the Sixth Circuit provided some notice to Petitioner that it would consider the issue whether the District Court's finding of prejudice should be sustained based on all the evidence considered by the District Court and had the Sixth Circuit afforded Petitioner an opportunity to argue that issue—even if only at oral argument—Petitioner's arguments on appeal would obviously have been significantly different. Rather than devoting his argument in opposition to the State's appeal to a refutation of the State's contention that the District Court lacked authority to conduct the federal habeas hearing, Petitioner could have focused on the differences between the evidence presented to the District Court and the record before the state post-conviction courts and could have explained why the District Court's finding of prejudice was proper in light of the evidence before it. Moreover, Petitioner could have presented any or all of the arguments that he now raises in Part II of his petition for certiorari. Thus, Petitioner could have presented argument on the following issues in connection with the evidence before the federal habeas court: (i) the proper test for finding prejudice from counsel's failure to introduce mitigation evidence as set forth in cases decided by the Fifth, Seventh, Eighth, and Eleventh Circuits; (ii) the effect of mitigation evidence on the jurors' sense of Petitioner's "moral culpability" in light of *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); (iii) the requirement that the reviewing court consider the "totality" of the mitigation evidence and not merely discrete "aspects" of that evidence in

analyzing the prejudice issue; (iv) whether and how the Sixth Circuit's analysis of prejudice should have been affected by the existence of aggravating circumstances; (v) whether evidence of Petitioner's past violent behavior was harmful to Petitioner despite this Court's observation in *Williams*, 529 U.S. at 398, that such evidence can be mitigating by showing that a defendant's violent acts may be compulsive rather than premeditated; (vi) whether the District Court properly found prejudice based on its conclusion that a single juror might have been swayed against the death penalty; and (vii) the case law finding prejudice where a defendant's counsel failed to present *any* mitigation evidence to the jury—a fact on which the District Court placed considerable importance and which the Sixth Circuit elided in its opinion. Furthermore, as noted earlier, Petitioner could have pointed out to the Sixth Circuit that the State had abandoned the prejudice issue by not raising it in its appeal and that there were no exceptional circumstances that would justify overlooking that abandonment.

Petitioner did not raise any of these arguments in his brief or at oral argument because there was no reason for him to do so in light of the State's failure to raise in his briefs or at oral argument the issue whether the District Court's finding of prejudice could be sustained based on the evidence considered by the District Court. The fact that Petitioner in the present case included in his appellate brief's statement of facts some evidence that he had introduced in the District Court does not diminish his claim that he was not on notice of any need to argue the legal significance of those facts given the limited manner in which the State had framed the issue on appeal.

The Sixth Circuit's failure to consider argument from the parties' counsel on questions that turned out to be dispositive of whether Petitioner should die at the hands of the State led it to disregard crucial issues on which the parties justly believed they had no need to focus—including an issue of such national importance that this Court granted certiorari on the

question just two years ago in order to resolve a conflict among the circuits on the issue. In *Williams,* this Court granted review of (but ultimately did not address) the question whether, in a state in which a single juror can prevent the imposition of the death penalty at sentencing, the *Strickland* prejudice inquiry should properly focus on whether there exists a reasonable probability that *even a single juror* would have concluded that the death penalty was appropriate. Although Tennessee is such a state, the Sixth Circuit in the present case, unlike the District Court, utterly failed to consider the implications of Tennessee sentencing law for the *Strickland* inquiry and instead erroneously framed the *Strickland* prejudice inquiry in terms of the probability that the "sentencing jury" as a whole would have concluded in light of mitigating and aggravating circumstances that petitioner should be sentenced to death. The Sixth Circuit's complete disregard of such a crucial issue—an issue which had recently commanded this Court's focus—was undoubtedly the result of the Sixth Circuit's failure to afford counsel for Petitioner and the State an opportunity to address the issue by presenting relevant authority, as well as argument based on the facts adduced in the federal habeas hearing.

In undertaking, on its own initiative, to revisit and reverse the District Court's determination that the record developed in the federal evidentiary hearing supported Petitioner's claim of prejudice, the Court of Appeals, in two respects, reached a decision much weightier even than the one usually made by the District Court in the first instance: First, unlike a decision by a district court, a court of appeals' first-hand interpretation of the record is unreviewable save by a writ of certiorari. Second, the status quo at the time the Court of Appeals undertook its review was that Petitioner was *not* facing imminent execution at the hands of the State, making the court's review of the record the practical equivalent of a decision whether to reimpose the death penalty. The Court of Appeals chose to make this life-or-death determination without alert-

ing the parties as to the manner in which it intended to do so, and without giving Petitioner a chance to be heard on the issue that proved to be decisive before the Sixth Circuit. The Sixth Circuit thereby provided Petitioner with no reasonable notice and opportunity to present argument on the issue that ultimately led that court to reinstate his death sentence.

It is putting it mildly to describe as ill-advised the Sixth Circuit's decision to dispense with argument by counsel on the issue that proved, in the Sixth Circuit's own estimation, to be decisive of whether Petitioner should live or die at the hands of the State. The District Court record was voluminous, and the evidence that needed to be considered extensive. The record included transcripts of a District Court evidentiary hearing that spanned six full days of live testimony and that involved over twenty witnesses and more than one hundred fifty exhibits. The notion that the Sixth Circuit could adequately review such evidence *without the benefit of argument from counsel* as to how that evidence showed that Petitioner was prejudiced by his counsel's ineffectiveness defies credulity and runs counter to this Court's recognition of the important role played by counsel in highlighting the significance of particular evidentiary facts. *Cf. Simmons*, 512 U.S. at 174 (Ginsburg, J., concurring) ("[T]he defendant's right to be heard means that he must be afforded an opportunity to rebut the argument [against him].") The Sixth Circuit's disregard of the importance of such argument borders on brazenness in the capital sentencing context: "Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (citation omitted).

Under these circumstances, even if the Sixth Circuit's decision in this case raised no conflict of law among the circuit

courts—although such conflicts are apparent in this case—review on certiorari would still be appropriate because the Sixth Circuit's decision in this case "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). Cases such as this one involving "serious questions in the administration of federal criminal justice," are appropriate for this Court's review, even where no circuit split is identified. *McNabb v. United States*, 318 U.S. 332, 333 (1943) (granting certiorari to consider question of admissibility of evidence in criminal proceeding). *See also Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."). This Court has also recognized the appropriateness of review in capital cases raising important questions of criminal procedure. *See Mallory v. United States*, 354 U.S. 449, 450 (1957). Here, it is only review by this Court that will give Petitioner the right—*in any tribunal*—to defend the District Court's ruling that the evidence adduced at the federal evidentiary hearing demonstrated that he was prejudiced by his counsel's ineffective assistance at sentencing and that his death sentence was unconstitutionally imposed. This Court accordingly should grant Petitioner's request for review so that he may be heard, as fundamental fairness in the administration of justice requires, on the issues that will determine whether he lives or dies.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

The Cornell Death Penalty Project (the Project) is an undertaking of the Cornell Law School.[1] The Project conducts empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (the CJP).[2] The Project is responsible for the CJP's efforts in South Carolina. Empirical analyses based on CJP data have been published in a number of articles.[3]

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[1] Pursuant to Supreme Court Rule 37.6 *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

[2] For a description of the CJP and its methodology, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

[3] Quantitative analyses of CJP data to date can be found in John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001) (South Carolina data); Bowers, *supra* note 2; William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) (multistate data); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998) (multistate data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (South Carolina data); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371 (2001) (South Carolina data); Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) (South Carolina data); Theodore

The Project seeks to intervene as *amicus curiae* in cases in which empirical research exists that might facilitate the resolution of the questions presented.

Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) (South Carolina data) [hereinafter Garvey, *Aggravation and Mitigation*]; Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs – Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data). Qualitative analyses of CJP data to date can be found in Joseph L. Hoffmann, *Where's The Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

REASONS FOR GRANTING THE WRIT

I.

BUT FOR TRIAL COUNSEL'S DEFICIENT PERFORMANCE, PETITIONER WOULD LIKELY HAVE BEEN SENTENCED TO LIFE IMPRISONMENT INSTEAD OF DEATH.

Petitioner has set forth a variety of reasons why a petition for a writ of *certioriori* should be granted in this case. We limit our discussion here to the following issue, which is relevant to the second question presented in the petition: Would the outcome of the penalty phase have been different if trial counsel had challenged the State's aggravating circumstances and/or presented mitigating evidence? The data we present below provide strong empirical reason to believe that the answer is yes with respect to both aggravation and mitigation.

A. Aggravating Evidence

What did the jury hear? – The jury found three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious, and cruel in that it involved physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, a statutorily enumerated felony.

Based solely on the evidence presented at trial, the members of the jury saw before them an alleged drug

dealer who killed another drug dealer (and tried to kill the other drug dealer's girlfriend) in what the prosecutors described as a turf battle. On top of that, petitioner committed the killing with a butcher knife and stabbed the victim "six times in the chest, penetrating his heart four times." *Abdur'Rahman v. Bell*, 226 F.3d 668, 699 (6th Cir. 2000). And on top of that he had been previously convicted of murder. This picture – taken at face value – is hardly one likely to prompt a vote for life.

What should the jury have heard? – According to the defense, however, the jury could have and should have had before it a very different picture. First, the jury should have heard, and but for the deficient performance of defense counsel would have heard, persuasive evidence that petitioner was not and could not have been the actual assailant because not a spot of blood was found on the coat he was wearing at the time of the offense. Instead, the blood splatter evidence indicates that petitioner's co-defendant (Miller), who pled guilty to second degree murder (and avoided the death penalty) in exchange for his testimony against petitioner, alone committed the assault.[4] Second, the jury should have known,

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[4] The evidence supporting this claim is set forth in the unrebutted expert testimony of Dr. Kris Sperry, a forensic pathologist, presented at the district court hearing in this habeas proceeding. *See* Dist. Ct. Tr. at 10 – 82. Even if this evidence had not been sufficient to fully persuade the jury that the co-defendant committed the offense, it may well have permitted petitioner to avoid the death penalty. This is because evidence of lingering or residual doubt is among the most powerful mitigating evidence available. *See* Garvey, *Aggravation and Mitigation*, *supra* note 3, at 1563-64.

and but for the deficient performance of defense counsel would have known, that petitioner's prior conviction for murder was based on the killing of a prison inmate committed out of fear that the victim was about to rape him. Indeed, petitioner had already been the victim of a series of such assaults.

What difference would it have made? – The results presented in Table 1 confirm what common sense suggests. Leaving the State's case in aggravation unchallenged presented a strong case in favor of death. The data are based on interviews with over 1,000 capital jurors from several different states. Jurors were asked how they thought a particular aggravating or mitigating fact or circumstance would affect their decision: Would it make them more or less likely to vote for death, or would it leave them just about the same? We present here only the results relevant to the case at hand.

The figures in Table 1 suggest that capital jurors who know only that the defendant has a history of violence or who believe the killing was especially brutal – which is all that the jurors in this case knew or believed – are apt to treat those facts as highly aggravating. Most jurors say those facts did or would make them more likely to vote for death.

Table 1
Likely Impact of Uncontested Statutory Aggravating Circumstances (i)(2) and (i)(5)

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of violent crime (analogous to statutory aggravating circumstance (i)(2))	65%	31%	4%	1017
Killing was brutal, involving torture or physical abuse (analogous to statutory aggravating circumstance (i)(5))	82%	16%	2%	1017

Source — Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575–76 tbl.10 (1998).

It only stands to reason that if the jury in this case had been told that the defendant's prior crime of violence was committed in the honest belief that it was necessary to protect himself against an assault, and that the brutal killing in the instant case was in fact committed by someone else, the State's case in aggravation would have been considerably weaker than it was. It appeared as strong as it did only because the defendant's trial counsel didn't do his job.

B. Mitigating Evidence

What did the jury hear? – The answer to that question is easy: almost nothing.[5] As the District Court wrote, "No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty." *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1101 (M.D. Tenn. 1998).

What should the jury have heard? – They should have heard a lot more than they did. The evidence available in

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[5] Moreover, the meager mitigating evidence that was presented was filtered through an instruction that, according to expert testimony presented in the District Court (*see* Dist. Ct. Exh. 153), would more likely than not have led several members of the jury to believe – contrary to longstanding Eighth Amendment law – that they could not consider even that evidence unless all the other members of the jury agreed on its existence. The expert findings presented to the District Court are fully consistent with Capital Jury Project research. *See, e.g.*, James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1165-66 tbl.1 (1995) (North Carolina jurors).

mitigation – described in considerable detail in Judge Campbell's opinion in the District Court, as well as in Judge Cole's dissenting opinion in the Court of Appeals – included two kinds of mitigating evidence about which the CJP gathered data: child abuse and mental illness. Accordingly, we focus our discussion here on the effect these two mitigators would likely have had on the jurors in petitioner's case – if only they had had a chance to hear it.

Petitioner's social history paints a vivid picture of the most extreme forms of childhood physical and emotional abuse.[6] Petitioner's father would strike petitioner's penis with a baseball bat; he would put petitioner in a closet "hogtied" and naked and would then leave him there for hours on end; he would beat petitioner with a military strap until petitioner could no longer move; he would force petitioner to eat his own vomit; and on and on.

If petitioner's father was a sadist and alcoholic, his mother was utterly incapable of forming a normal maternal bond with her children. She stopped petitioner from playing with friends; refused to let him take part in school activities; and never bothered to tend to the injuries he would suffer from the beatings her husband would regularly administer. Petitioner had no safe haven. He could only run away and hide in the woods, or else retreat inside, mentally and emotionally checking out and shutting down.

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[6] *See* Dist. Ct. Exh. 141 (social history); Dist. Ct. Tr. at 613 – 63 (testimony of Dr. Diana McCoy).

According to Dr. Diana McCoy, a psychologist and mitigation expert who testified in the district court hearing:

> In my opinion in the 20 or so [capital] cases I have done, it is one of the most compelling social histories that I have encountered and one of the saddest stories, and I think one of the most graphic in explaining this individual's development and behavior that I have encountered.[7]

Dr. Raymond Winbush said this:

> [Petitioner's cases] is singularly the worst case of abuse I have come across in 25 years being an academic psychologist.[8]

The abuse petitioner suffered as a child had predictable consequences. According to the psychiatric testimony introduced in the District Court, petitioner suffers from not one but three distinct disorders: post-traumatic stress disorder, borderline personality disorder, and dissociative disorder.[9] These disorders in turn have predictable behavioral manifestations. Petitioner suffers from delusional thinking; he is emotionally unstable; he labors under a deep and debilitating need to feel as if he belongs; he is especially vulnerable to the influence and depredations of others; and under conditions of extreme

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[7] Dist. Ct. Tr. at 663.

[8] Dist. Ct. Tr. at 1315.

[9] *See* Dist. Ct. Tr. at 439 – 601, 613 – 63, and 1307 – 42 (testimony of Drs. Sadoff, McCoy, and Winbush).

stress he breaks away from reality altogether.[10] The jury knew none of this.

What difference would it have made? – Table 2 shows that this kind of mitigating evidence can make a big difference. Sixty-seven percent of the jurors interviewed assigned mitigating weight to the fact that the defendant had a history of mental illness, and forty-three percent assigned mitigating weight to the fact that the defendant had been seriously abused as a child. Consequently, the outcome of petitioner's penalty phase hearing might very well have been different if petitioner's trial lawyer had presented evidence of this kind, as he could and should have done.

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[10] *See* Dist. Ct. Exh. 141 (social history).

Table 2

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	3%	30%	67%	1017
Defendant had been seriously abused as a child	1%	56%	43%	1017

Source — Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575–76 tbl.10 (1998).

How could the Court of Appeals have cast aside this evidence as unimportant? In her concurring opinion in the Court of Appeals, Judge Batchelder agreed with the view expressed by the state post-conviction court to the effect that the aggravating evidence presented at petitioner's trial was so powerful that the mitigating evidence which should have been presented (but wasn't) would have made no difference to the outcome. *Abdur'Rahman*, 226 F.3d at 719 (Batchelder, J., concurring). Table 3 examines this claim and casts considerable doubt on it.

Table 3 looks at two groups of jurors. Panel A looks at jurors who actually sat on cases in which the defendant had a history of violent crime. Panel B looks at jurors who actually sat on cases in which the killing was brutal, involving torture or physical abuse. Do jurors within these two groups continue to assign mitigating weight to the kind of evidence that should have been presented in petitioner's case?

Yes. By and large the fact that the case involved the same kind of aggravating evidence the State presented in petitioner's case does little, if anything, to reduce the impact of the mitigation evidence – even if the State's case in aggravation has gone unchallenged and unrebutted (which of course it shouldn't have in this case). The evidence that should have been presented in mitigation would have remained mitigating in the minds of many jurors, if not most of them, despite the evidence presented in aggravation.

Table 3

A

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present — Impact Among Jurors Who Sat on Cases in which the Defendant had a History of Violent Crime

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	4%	34%	63%	56
Defendant had been seriously abused as a child	2%	55%	43%	56

B

Likely Impact of Mitigating Circumstances Trial Counsel Failed to Present — Impact Among Jurors Who Sat on Cases in which the Killing was Brutal, Involving Torture or Physical Abuse

"Did or would this factor make you . . . likely to vote for death?"				
	More	Same	Less	*n*
Defendant had a history of mental illness	5%	35%	61%	112
Defendant had been seriously abused as a child	3%	65%	32%	115

Source — Data gathered from 187 jurors who sat on one of 53 capital cases tried in South Carolina between 1986 and 1997.

The point *amicus* wishes to make is simple. First, because the defendant's trial counsel failed to do his job, the State was able to present a powerful case in aggravation. That case would have been substantially weaker if the defendant's lawyer had given the jury the full story. Second, because the defendant's trial counsel failed to do his job, the jury heard almost nothing in mitigation. But a strong case in mitigation could and should have been made and almost certainly would have affected several jurors' thinking about the case. Thus, if trial counsel had done his job the State's case in aggravation would have been significantly weaker and the petitioner's case in mitigation would have been significantly stronger.

The test for prejudice under *Strickland* is whether a "reasonable probability" exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Moreover, as the District Court recognized (but the Court of Appeals did not), a death sentence cannot be imposed under Tennessee law unless *all* the jurors agree that death is the appropriate punishment. If the jury is not unanimous in favor of death, a sentence of life imprisonment is imposed as a matter of law. *See Abdur'Rahman*, 999 F. Supp. at 1101 (*citing* Tenn. Code Ann. § 39-2-203). The result in this case would therefore have been different – it would have been life instead of death – if one juror and one juror alone had come to the conclusion that death was unwarranted.

Based on the empirical evidence presented above, more than a "reasonable probability" exists that at least

one juror would – "but for counsel's unprofessional errors" – have reached that conclusion. *Amicus* respectfully submits that the majority below was wrong and Judges Campbell and Cole were right: But for defense counsel's deficient performance the outcome of petitioner's penalty phase hearing would likely have been different. Petitioner would likely have been sentenced to life imprisonment, not death. Accordingly, the Court should grant the writ in order to resolve the conflicts of law that are detailed in petitioner's application and that led the majority below to reach the opposite conclusion.

CONCLUSION

For the reasons set forth above, together with the reasons set forth in petitioner's submission, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 22, 2001

CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

Supreme Court, U.S.
FILED
JUN 25 2001
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IN THE
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE, NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER, AND TENNESSEE VOICES FOR CHILDREN, INC. IN SUPPORT OF PETITIONER

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June 22, 2001

QUESTIONS PRESENTED

I. Whether the panel majority's prejudice analysis was erroneous, including because:

A. Trial counsels' deficient performance deprived Petitioner of his fundamental right to have the sentencer give a reasoned moral response to his evidence;

B. The panel majority attached an aggravating label to evidence that actually militates in favor of a lesser penalty than death.

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INTERESTS OF *AMICI CURIAE*[1]

NATIONAL MENTAL HEALTH ASSOCIATION (NMHA) is a non-profit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA seeks to remove the stigma and prejudice associated with mental illness. NMHA has more than 340 affiliates nationwide. NMHA believes that mental illness can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental illness should always be taken into account during all phases of a potential death penalty case. Furthermore, NMHA believes that the age, maturity, mental status, and any childhood history of abuse/trauma of an offender should always be considered in deciding his or her punishment.

NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE (NAMI Tennessee) is a non-profit organization founded in 1985 and affiliated with the National Alliance for the Mentally Ill, headquartered in Arlington, Virginia. NAMI Tennessee participates in advocacy on the local, state and national levels to ensure quality and accessible hospital and community services for persons with mental illness, and to change stereotypes, dispel myths, and overcome the stigma associated with mental illness. NAMI Tennessee strongly believes that persistent mental illness is a mitigating factor that must be considered by the jury in a capital sentencing hearing.

NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS is a national organization founded in 1968 with an active membership of 5,000 social work practitioners, professors

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

and scholars. Its primary focus is the preservation of the Black family, an objective which is augmented and supported by the work of various committees, including those in the area of criminal justice.

NATIONAL ASSOCIATION OF SOCIAL WORKERS (NASW) is a professional membership organization comprised of more than 150,000 social workers with chapters in every state, the District of Columbia, and internationally. Established in 1955, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. Among its activities in furtherance of its purposes, NASW promulgates professional standards and criteria, conducts research, publishes books and studies of interest to the profession, provides continuing education and enforces the NASW *Code of Ethics*. NASW has adopted a Policy on Mental Health affirming the Association's commitment to take a lead in influencing public policy on mental health issues and to educate the public about mental health as a means of fostering prevention and intervention. NASW's participation in this case furthers NASW's policy on mental health issues.

NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER (TN-NASW) is the Tennessee chapter of NASW. TN-NASW has over 2000 members. TN-NASW joins this *amici curiae* brief based on a strong conviction that a capital sentencing jury must be presented with available mitigating circumstances in order to properly decide whether or not to impose the death penalty, which TN-NASW believes is often inequitably applied to people of low-income backgrounds, people of color, and people who are mentally ill.

TENNESSEE VOICES FOR CHILDREN, INC., is a statewide, not-for-profit, non-partisan organization of families, professionals, business and community leaders, and government representatives committed to improving and expanding services related to the emotional and behavioral well-being of children. Tennessee Voices for Children joins this *amici curiae* brief because it believes that capital defendants who suffered from extreme physical and emotional abuse as children should be given an opportunity to present the history and circumstances of their lives to the jury that is deciding whether to impose a sentence of life or death.

SUMMARY OF THE ARGUMENT

Petitioner Abu-Ali Abdur'Rahman is a criminal defendant with an extensive history of severe childhood abuse and serious mental illness, none of which was presented to the jury that sentenced him to death. His trial counsel failed to conduct even the most perfunctory investigation into his background and failed to present *any* mitigating evidence at his capital sentencing hearing. Every state and federal court that has considered counsel's performance has concluded that it was deficient. The federal district court judge—the only fact-finder to have heard the entire unpresented case in mitigation—concluded that Mr. Abdur'Rahman was prejudiced by counsels' deficient performance and ordered the issuance of a writ of habeas corpus as to Petitioner's death sentence.

A panel of the Court of Appeals for the Sixth Circuit, with one member dissenting, reversed the Order of the district court on the grounds that, although counsels' performance was clearly deficient, Petitioner was not prejudiced thereby because the mitigating evidence, which the panel majority acknowledged to be "compelling," also had "aspects" that would be evidence of "aggravating circumstances." That conclusion was wrong as a matter of law—under Tennessee law only evidence relevant to narrowly-defined statutory aggravating circumstances may be

considered by the jury as a basis for imposing the death penalty, and there are no aggravating circumstances which would find support from what the panel majority summarily characterized as a "history of violent character traits."

Moreover, the panel majority's conclusion ignores a vast body of knowledge resulting from more than a century of scientific and social investigation into the root causes of mental illness and compulsive violent behavior. By doing so, the panel majority betrays a fundamental misunderstanding of the nature and etiology of mental illness, disregards the causal relationship between mental disorders and childhood abuse and neglect, and contravenes many of the basic principles of capital jurisprudence announced by this Court. *Amici curiae* reject the arbitrary characterization of mental illness as favorable or unfavorable, and strongly oppose a ruling that would deny a mentally-ill defendant the "reasoned moral response" to his mitigating evidence, Penry v. Lynaugh, 492 U.S. 302, 328 (1989), that is the *sine qua non* of capital sentencing. The Petitioner was denied that fundamental right because the jury never heard *any* of his mitigating evidence.

ARGUMENT

I. THE PANEL MAJORITY'S PREJUDICE ANALYSIS WAS WRONG, INCLUDING BECAUSE:

A. TRIAL COUNSELS' DEFICIENT PERFORMANCE DEPRIVED PETITIONER OF HIS FUNDAMENTAL RIGHT TO HAVE THE SENTENCER GIVE A REASONED MORAL RESPONSE TO HIS EVIDENCE.

Four mental health experts testified at the hearing before the district court in this case.[2] All agreed that Petitioner suffered

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[2] Dr. Samuel Craddock, a clinical psychologist called by the State, who had examined the Petitioner prior to his trial in 1987; Dr. Robert Sadoff, a forensic psychiatrist who examined the Petitioner as part of

from serious mental illnesses: delusional thinking, Borderline Personality Disorder, Post-Traumatic Stress Disorder, paranoia, and dissociation. The evidence of Petitioner's mental disorders was uncontroverted. Similarly, the evidence that Petitioner suffered extreme abuse and neglect during childhood went unchallenged.[3] And yet, the jury that sentenced Petitioner to death never heard anything about his disturbed childhood and

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the habeas proceedings; Dr. Diana McCoy, a clinical psychologist and mitigation expert who prepared a detailed social history of the Petitioner as part of the habeas proceedings, and Dr. Raymond Winbush, an academic psychologist also retained by the defense as part of the habeas proceedings. A fifth expert, Dr. Daniel Martell, a forensic neuropsychologist retained by the State, listened to the testimony of Dr. Sadoff, but was not called to testify.

[3] Dr. McCoy, who prepared the social history of Petitioner, found that his mother was a mentally disturbed, sexually promiscuous alcoholic who abandoned her first three children in the woods when they were infants and was unable to properly bond with any of her children. Petitioner's father was also a sexually promiscuous alcoholic who inflicted extreme physical abuse on Petitioner and his siblings. He hog-tied and locked Petitioner in a dark closet for extended periods of time, beat him with billy clubs and military straps (usually focusing the beatings on Petitioner's genitals), and forced him to eat his own vomit. Dr. McCoy, who had worked on more than 20 capital cases, characterized Petitioner's background as "one of the most compelling social histories that I have encountered and one of the saddest stories." (Tr. 662-63). Dr. Winbush testified that Petitioner's was the "singularly worst case of abuse I have come across in 26 years being an academic psychologist." (Tr. 1315).

Petitioner has a long history of being institutionalized for psychological evaluation and/or treatment (age 14, Western State Hospital, Tacoma, Washington, treatment; age 16, New Jersey State Hospital, following suicide attempt; age 18, St. Elizabeth's Hospital, Virginia, observation and examination; age 21, FCI, Tallahassee, Florida, following suicide attempt and self-mutilation). While institutionalized, Petitioner has been prescribed, at various times, the following psychotropic medications: Thorazine, Chloropromazine, Artane, Prolixin, Haldol, and Sinequan.

long history of mental illness because his trial counsel failed to conduct *any* investigation and failed to present *any* mitigating evidence.

This Court has long insisted that "[c]onsideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" California v. Brown, 479 U.S. 538, 554 (1987) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality)). The Court has mandated that the decision whether to impose the death penalty be a "reasoned moral response" to the evidence, Penry v. Lynaugh, 492 U.S. 302, 328 (1989), and has emphasized that "[i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976).

Other circuits, faced with similar examples of trial counsel's complete failure to investigate and present any mitigating proof, have concluded that a finding of prejudice was unavoidable: "A finding that [Petitioner] was not prejudiced by this failure would deny [Petitioner] the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor .... We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding [Petitioner's] fate." Deutscher v. Whitley, 884 F.2d 1152, 1161-62 (9th Cir. 1989); see also Collier v. Turpin, 177 F.3d 1184, 1202-04 (11th Cir. 1999) ("The jury was called upon to determine whether a man whom they did not know would live or die; they were not presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the

conditions of his life. Had they been able to do so, we believe that it is at least reasonably probable that the jury would have returned a sentence other than death"); Dobbs v. Turpin, 142 F.3d 1383, 1386-87 (11th Cir. 1998) ("We have found prejudice in past cases where counsel's failure to investigate resulted in similar omissions of mitigating evidence"); Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) (prejudice requirement "clearly met" by counsel's failure to present evidence of petitioner's childhood poverty and history of mental illness).

In the present case, the district court reached a similar conclusion: "[T]he overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand." Pet. App. 97a.[4]

The district court was the only fact-finder to have heard the entire case in mitigation that could have and should have been presented on behalf of this Petitioner. The court found the Petitioner's witnesses to be credible and the case in mitigation substantial. While acknowledging that not all of the evidence was helpful to Petitioner, the court concluded that "there is more than a reasonable probability that, had trial counsel introduced the mitigation they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing." Pet. App. 86a.

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[4] In its Order granting the writ of habeas corpus as to Petitioner's death sentence, the district court set out some of the mitigating evidence in Petitioner's case. Pet. App. 88a-94a. Likewise, Judge Cole, writing in dissent from the panel majority's reversal of the district court's Order, noted the extensive case in mitigation that was never presented to Petitioner's jury. Pet. App. 41a-46a.

B. THE PANEL MAJORITY ATTACHED AN AGGRAVATING LABEL TO EVIDENCE THAT ACTUALLY MILITATES IN FAVOR OF A LESSER PENALTY THAN DEATH.

The panel majority in this case, without discussion or analysis, summarily concluded that despite the obvious deficiencies in trial counsels' performance and the compelling nature of the unpresented mitigating evidence, Petitioner had suffered no prejudice under Strickland because certain "aspects" of the evidence "would be compelling evidence of aggravating circumstances." The panel majority specifically cited Petitioner's "motive for killing a fellow prison inmate and a history of violent character traits." Pet. App. 20a.

Preliminarily, it should be noted that Petitioner's prior conviction for second degree murder for the prison killing and a prior conviction for assault were already before the jury, and, as the dissent noted, would not have subjected Petitioner to additional statutory aggravating factors. Pet. App. 45a.

Moreover, as the district court noted, the explanation that the prison killing was in response to predatory homosexual attacks on Petitioner and extortion for homosexual favors by the homicide victim would actually have mitigated an otherwise unexplained act of violence. Pet. App. 93a. Because trial counsel failed to investigate the prior conviction, the jury was never provided with any facts about the circumstances of the prison killing. The panel majority's general allusion to a "history of violent character traits"—presumably a reference to some of the psychiatric diagnoses Petitioner had received when institutionalized—was not evidence a jury could have considered as support for any statutory aggravating factor under Tennessee law. Thus, the panel majority's conclusion that the mitigation proof contained "compelling evidence of aggravating circumstances" was wrong as a matter of law.[5]

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[5] At most, that evidence only would have been admissible as

Equally disturbing is the panel majority's apparent characterization of Petitioner's past psychiatric diagnoses and/or symptoms as evidence of "aggravating circumstances." Mental illness is an unavoidable condition. To punish someone because he suffers from a mental illness is clearly unconstitutional. See Robinson v. California, 370 U.S. 661, 666 (1962) ("[I]n light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"). To enhance punishment by finding that a defendant's mental illness is an "aggravating" circumstance is similarly impermissible. Zant v. Stephens, 462 U.S. 862, 885 (1983).

In Zant, the Court upheld a Georgia inmate's death sentence, notwithstanding the jury's reliance on an invalid aggravating circumstance, because the state had *not* "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness (citation omitted)." 462 U.S. at 885.

The panel majority in this case attached an "aggravating label" to Petitioner's evidence of mental illness by concluding that a description of Petitioner's "motive" for committing a prior homicide and his "history of violent character traits" would have offset what it acknowledged to be "mitigating evidence that a sentencer might find to be compelling," see Pet. App. 20a.

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rebuttal to mitigating circumstances that might have been proffered. See Cozzolino v. State, 584 S.W.2d 765, 767-68 (Tenn. 1979); Carter v. Bell, 218 F.3d 581 (6th Cir. 2000). Significantly, the State declined the opportunity to offer such rebuttal evidence at the hearing before the federal district court: Dr. Martell, the State's expert, who listened to the testimony of Dr. Sadoff and was in the courtroom, was not called to testify and Petitioner's psychiatric proof was not contested. Tr. 601.

As noted, Petitioner's prior homicide was a response to predatory homosexual attacks in prison. Elmer H. Bishop, a correctional supervisor at the institution where the homicide occurred, testified in his deposition that Petitioner was under extraordinary pressure at the time. Less than two months prior to the homicide, Petitioner was assaulted for resisting homosexual advances by another inmate. Exhibit 135, pp. 14-15. Mr. Bishop testified that because Petitioner was younger and smaller in stature he was "the target of predators." Id. at 21.

The homicide victim, Stein, was a known homosexual who had "circulated false rumors of abnormal sexual activity" between himself and Petitioner. Bishop testified that Stein "was a member of a group of inmates who were attempting to apply extortionate pressures on [Petitioner] to submit to Stein's demand for homosexual activities," and that the homicide arose out of the earlier assault on Petitioner by members of that group. Id. at 22, 25. Petitioner attempted to work out the problem with Stein, but was pushed and laughed at. He "lost his temper ... got very angry," and impulsively stabbed Stein. Id. at 26.

Viewed in context, the foregoing explanation of Petitioner's "motive" for committing the homicide is mitigating, not aggravating. Dr. Sadoff testified that Petitioner suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder—both of which can lead a person to experience intense, even psychotic, reactions of fear and anger in stressful situations.[6] Dr. McCoy testified that Petitioner's vulnerability and fear were heightened in the prison setting where he was repeatedly raped and threatened with rape by other inmates. Tr. 639-640. The explanation that Petitioner killed another inmate because he was feeling persecuted and threatened by that person was certainly more likely to induce feelings of compassion in jurors than *no explanation whatsoever*, particularly when the

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[6] As the district court noted, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. Dr. Masri also diagnosed Petitioner as having a Borderline Personality Disorder. Pet. App. 93a.

prosecutor argued that the killing was "deliberate."[7]

The panel majority's conclusion that the "motive" for the prior homicide would have been more aggravating than mitigating is not supported by the record. The panel's assessment of the evidence ignored the testimony of the experts and usurped the role of the jury, see, e.g. Smith v. Stewart, 140 F.3d 1263, 1270-71 (9th Cir. 1998) ("[W]e are not asked to imagine [in assessing prejudice] what the effect of certain testimony would have been upon us personally," but rather "what the effect might have been upon the [sentencer]").

The effect the unpresented mitigating evidence would have had on Petitioner's jury is clearly shown in affidavits obtained from eight of the jurors who sat on the case. They each expressed dismay at not having been informed of, *inter alia*, Petitioner's history of mental illness and hospitalizations, childhood abuse, attempted suicides, and homosexual threats against him in prison. Most of the jurors stated that had they known those facts about Petitioner's background they probably would have voted for a life sentence. See Affidavits attached as an appendix hereto.

The panel majority's assessment of Petitioner's "history of violent character traits" also ignores the testimony of the expert and lay witnesses. As the district court noted, the record does contains evidence of several convictions for assault, and a number of prison citations for misconduct. However, in the context of the entire mitigation case they were not terribly significant.[8]

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[7] Under Tennessee law, T.C.A. § 39-13-201(b)(1), a "deliberate" act is one performed with "cool purpose"—exactly the opposite of what the facts show Petitioner's mental state to have been when he committed the prior homicide. But the jury had no way of knowing that, since they were given no information at all about the circumstances surrounding the prior conviction.

[8] The evidence of Petitioner's misconduct, when viewed in context, is understandable as a product of his mental illnesses and/or his response to a dangerous environment. But even if viewed out of

Petitioner also had been diagnosed as having a "sociopathic personality disturbance with anti-social reaction," an "antisocial personality," and a "psychopathic personality." Pet. App. 95a. The three diagnoses are actually three different names for the same disorder: what is now formally designated as "Antisocial Personality Disorder." See *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV) 645-49 (1994).

With regard to the diagnoses of Antisocial Personality Disorder, all the experts agreed that Petitioner's primary Axis II diagnosis is Borderline Personality Disorder (BPD), *not* Antisocial Personality Disorder (APD). Dr. Sadoff, whom the State's expert considered one of the ten foremost forensic psychiatrists in the country, Tr. 144, explained why BPD was the proper diagnosis. Tr. 468, 540, 554, 584. BPD is characterized by many of the same features as APD—e.g. impulsivity, reckless disregard for the safety of others, irritability and anger—but it is a much more serious illness in that it also involves marked identity disturbance, emotional instability, paranoia, dissociation, and transient psychotic episodes. See DSM-IV at 650-54; Tr. 457.

Dr. Winbush noted with regard to the diagnoses of APD in Petitioner's prison records, that it is fairly common for black males to get such a diagnosis more often than is warranted, and in his opinion the more recent diagnoses of Petitioner as suffering from Post-Traumatic Stress Disorder and BPD were more accurate than the older ones dating back fifteen or twenty years. Tr. 1321. Moreover, as Dr. McCoy testified (quoting DSM-IV), "[T]he diagnosis [APD] may at times be misapplied to individuals in settings in which seemingly antisocial behavior may be part of a protective survival strategy." Tr. 653. Much of Petitioner's misconduct was reported in the prison records,

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context, they are far less serious than the criminal acts noted in other cases where prejudice has been found. See, e.g., Williams v. Taylor, 120 S. Ct. 1495 (2000) (previous convictions for armed robbery, burglary and grand larceny, auto theft, and two separate violent assaults on elderly victims perpetrated after the capital offense).

and should not serve as the basis for a diagnosis of APD, Tr. 656, particularly when the criteria for other, more serious disorders are so evident.[9]

The root causes of Petitioner's mental disorders and antisocial behavior can be traced to the extraordinary abuse and neglect he suffered as a child. Tr. 475-78. Dr. Winbush described Petitioner's background as "singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read." He characterized the treatment of Petitioner by his father as "torture." Tr. 1315-16. Significantly, Petitioner's two full siblings, who were not abused as severely as Petitioner, suffered from similar psychological problems: His sister Sylvia has been in and out of mental hospitals and is violent and bipolar. Tr. 626. His brother Mark was accused of sexually and physically abusing his own children, had a terrible temper and would explode into rages; he ultimately committed suicide. Mark reportedly told his half-sister Nancy Lancaster that she didn't know what kind of hell he, Sylvia and Petitioner lived in. Tr. 626-27.

Dr. McCoy testified that Petitioner began running away

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[9] Furthermore, Petitioner has many positive traits that defeat the effort to brand him as a "sociopath." As Dr. McCoy noted, when "he is out of prison ... we see a person who for the most part is not getting in trouble." Tr. 654. Dr. Winbush also observed that "there were long periods of work history when he had an opportunity to be committing criminal acts but he didn't." Dr. Winbush noted that even in prison, when Petitioner did not feel threatened by rape, his behavior was not troublesome. Tr. 1340. And, as the district court noted, despite his mental health problems, Petitioner had functioned as a productive member of society: holding steady jobs, attending college, and performing volunteer work in poor neighborhoods. He was described as gentle, caring, filled with dignity, and a person of sincere religious beliefs. None of this positive evidence was heard by the jury. Pet. App. 92a.

from home when he was eight or nine. Tr. 630. The beatings from his father continued all through his childhood and were very severe. That abuse resulted in Petitioner having terrible, deep-seated conflicts and anger toward authority figures. Tr. 525-28, 636. Petitioner's early school evaluations variously describe him as "very sick and in need of immediate commitment," "psychotic," "paranoid," and "warped." One early diagnosis of "psychopathic delinquent" was changed to "personality pattern disturbance and paranoid personality." Tr. 637.

Petitioner was small of stature. When his family moved to a rough neighborhood in Philadelphia, he began carrying a knife to protect himself. It was in Philadelphia that his behavior really deteriorated. Much of that deterioration was due to the increased pressures which adolescence brought to bear on an already deeply disturbed individual with few internal or external supports. He needed treatment and protection, but none was forthcoming. One school evaluator noted that Petitioner had little control over his behavior, which was symptomatic of a deep disturbance, and that like a "frightened child" he attempted to cover his feelings to hide his low opinion of himself. Tr. 638. The record shows that Petitioner's mental illnesses antedated his behavioral problems. Once institutionalized, Petitioner's behavioral problems were exacerbated by the constant threat of rape.

The panel majority's characterization of Petitioner's mental illnesses and their attendant symptoms as "aggravating," and thus, as justification for finding no prejudice in the failure to introduce any mitigating proof in the sentencing hearing, was clearly a myopic view of the evidence.

Other circuits have considered the issue of Strickland prejudice when so-called "harmful" evidence is interspersed with the mitigating proof, and have concluded that although "some of the evidence could have harmed [petitioner] . . . the fact that counsel did not even investigate this mitigating evidence, combined with the general lack of any mitigating

evidence before the jury, denied [petitioner] any opportunity, vouchsafed by the law, to avoid the death penalty." Lockett v. Anderson, 230 F.3d 695, 716 (5th Cir. 2000).

In Kenley v. Armontrout, 937 F.2d 1298, 1308 (8th Cir. 1991), the court was even more emphatic; in words that could apply equally to Petitioner's case it said:

> The state courts and district court concluded as a matter of law that there was no prejudice because the mitigating evidence was "scant" and the aggravating evidence would have been more damaging. We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of [petitioner's] character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.
>
> Had all the reports been introduced into evidence and had all affiants and doctors testified, we do not deny the jury would have heard aggravating information . . . [W]e are doubtful that much of the additional aggravating information would have had any significant incremental effect on the jury. Further, the aggravating information was mostly cumulative.

See also Pickens v. Lockhart, 714 F.2d 1455, 1466-67 (8th Cir. 1983) ("It is sheer speculation that character witnesses in mitigation would do more harm than good ... and that Pickens was not prejudiced by the omission. Here, counsels' default deprived Pickens of the possibility of bringing out even a single mitigating factor"); Emerson v. Gramley, 91 F.3d 898, 906-07 (7th Cir. 1996) (prejudice found even though the unpresented mitigating evidence also contained a number of criminal acts (arson, armed robbery, attempted murder) omitted from the prosecution's enumeration of aggravating circumstances).

In Williams v. Taylor, 120 S. Ct. 1495 (2000), this Court

found prejudice in the failure to present mitigating evidence of the petitioner's abuse and neglect during his early childhood, the testimony of character witnesses, and proof of borderline mental retardation, notwithstanding Williams' previous convictions for armed robbery, burglary and grand larceny, auto theft, and two separate violent assaults on elderly victims perpetrated after the capital offense. Id. at 1500. Like the trial attorneys in this case, Williams' counsel did not begin to prepare for the sentencing hearing until a week before trial, and they failed to conduct an investigation that would have uncovered "extensive records graphically describing Williams' nightmarish childhood." Id. at 1514. The Court found that counsel's "unprofessional service prejudiced Williams within the meaning of Strickland." Id. at 1515.

Certainly, Petitioner's childhood was no less "nightmarish" and his counsels' performance no less "unprofessional" than that of Williams. If anything, they were worse. The panel majority's prejudice determination, like that of the courts in Williams, was clearly erroneous both legally and factually. As with Williams, the graphic descriptions of Petitioner's childhood, "filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability," and shown that, like Williams, "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." Id. at 1515-16.

CONCLUSION

Petitioner is a mentally ill defendant who was never afforded the opportunity to have a jury make the "reasoned moral response" to his evidence that is a constitutionally indispensable part of any decision to impose the death penalty. The panel majority attached an aggravating label to evidence that actually is mitigating. Petitioner was clearly prejudiced by trial counsels' failure to conduct *any* investigation or present *any* mitigating evidence.

For these reasons, as well, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel for *Amici Curiae*

AFFIDAVIT

Bonnie M. Meyer, being duly sworn, states under oath as follows:

1. I am a resident of Davidson County, Tennessee. I was a juror in the death penalty case of State vs. James Lee Jones, Jr., which was tried in Nashville, Tennessee, in July, 1987. I have a good memory of the trial and the jury's deliberations.

2. In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think that the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for the death penalty.

3. If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe I would have voted for the death penalty.

4. In voting on the sentence, I thought that the jury's vote had to be unanimous, whether the vote was for the death penalty or for a life sentence. I thought that it was the jury's duty to try to reach a unanimous decision on the sentence, and if a unanimous decision was not reached, then it would be a mistrial. I did not know or understand that if the jury was not unanimous on the death penalty, then the defendant would receive a life sentence. If I had understood this, then I probably would not have changed my mind and I would have continued to vote for a life sentence.

/s/
Bonnie M. Meyer
(Dated the 9th day of October, 1997)

AFFIDAVIT

I am Alice Stoddard, and I sat on the James Jones Jury in 1987. I would have wanted to know then about Mr. Jones's history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr. Jones' coat, and in particular I think the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr. Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us.

/s/_____
Alice Stoddard
(Dated the 23rd Day of April, 2001)

AFFIDAVIT

I am Jimmy Swarner and was a juror in the case of James Jones many years ago. I would have wanted to hear everything about Mr. Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems.

I don't want Mr. Jones to be put to death. I would like the governor to spare his life. We should have gotten to hear all the information about Mr. Jones.

/s/
Jimmy Swarner
(Dated the 23rd Day of April, 2001)

AFFIDAVIT

I am Scarlett McAllister Smith and was a juror in the case of James Jones. There are several things that have come to light about this that disturb me. I certainly would have wanted to see the TBI lab report which showed Mr. Jones had no blood on his clothes. I would have wanted to know all about Mr. Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father, which occurred when he was young. I really would have wanted to have heard from his wife about his behavior, talking to nonexistent people and animals and also heard about his family's mental health problems. We were given none of this at sentencing to consider for mitigation. Had I known all this at the time, there is a chance my decision would have been different. I feel that James Jones had the right to have all this presented to the jury.

/s/
Scarlett McAllister Smith
(Dated the 16th day of May, 2001)

AFFIDAVIT

I am Yolanda Howard and was a juror in the case of James Jones. I had no idea that James Jones had a history of very serious mental illness and hospitalizations for treatment of his problems. It seems to me the defense attorneys didn't bring out any of this, nor did they tell us anything about his family's problems either. I didn't know about the horrible abuse of this man by his father, and I certainly would have wanted to consider all this in deciding his sentence. It is my belief I would have voted for life for Mr. Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr. Jones at all because we weren't informed. Another thing that really bothers me is we did not see the TBI lab report about the blood tests. It seems important that we should have known that no blood was found on Mr. Jones's clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr. Jones's clothes. Basically I am upset that all this information was withheld from us in deciding this man's life. That is a very hard decision to make, and I think we should have had complete information.

/s/_____
Yolanda Howard
(Dated the 26th day of May, 2001)

AFFIDAVIT

Being on the James Jones jury was hard, and I remember a lot of the details presented in court. We were not given information detailing Mr. Jones' mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones's clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me – whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer. I do not want Mr. Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr. Jones before deciding his sentence – life or death. Given all the history of mental illness Mr. Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then. I believe people with problems can be helped.

/s/_____
Loretta L. Galloway Simpson
(Dated June 4, 2001)

AFFIDAVIT

To whom it may concern. Having met with Ms. Anne Walker-King & Mr. Chris Armstrong this evening & having reviewed various evidence in relation to Mr. Abu Ali, aka James Jones, it is my belief & opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence I would further offer for consideration that the death penalty be over turned in this case.

/s/
Everett C. Stone III
Jury Foreman
(Dated the 11th day of June 2001)

AFFIDAVIT

Being on the James Jones jury was hard, and I remember a lot of the details presented in court. We were not given information detailing Mr. Jones' mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones' clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me – whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer.

I am giving this statement because I think the jury in James Jones case should have heard evidence of Mr. Jones' mental illness and details of the childhood abuse he experienced. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results could have been different at sentencing if I had heard the true facts.

/s/
James D. Wimberly
(Dated the 13th day of June, 2001)

Supreme Court, U.S.
FILED
JUL 5 2001
CLERK

CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

The petition demonstrated that the district court's order vacating petitioner's death sentence and remanding for resentencing (the only such order ever entered by this district judge) would have been affirmed under the settled law of other circuits. Specifically, (i) petitioner's death sentence would not have been reinstated *sua sponte* on a ground that respondent abandoned without giving petitioner notice or an opportunity to be heard; (ii) given the strength of the district court's findings, petitioner would have been deemed prejudiced by his counsel's failure to introduce the "abundant" and "compelling" mitigation proof, and (iii) the instructions and juror form would have been found to suggest impermissibly that jurors must be unanimous in their determinations. Of note, respondent does not deny that the panel's central holding – that the death penalty should be reinstated because the jury would have imposed that sentence (regardless of the mitigating evidence) based on "the balance of aggravating and mitigating factors" (Pet. App. 20a) *without regard* to whether the evidence would "have influenced the jury's appraisal of [petitioner's] moral culpability" (*Williams* v. *Taylor*, 529 U.S. 362, 398 (2000)) – presents a conflict meriting review in this Court.[1] Certiorari accordingly should be granted.[2]

I. Certiorari Should Be Granted To Review The Panel Majority's Decision To Reinstate The Death Penalty Without Affording Notice Or An Opportunity To Be Heard.

1. There is no merit to respondent's argument (BIO 6-7) that, because the Sixth Circuit would have "reached the same legal conclusion had it relied solely on the state court record,"

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[1] Respondent's suggestion that the decision below rests only on the majority's *sub rosa* view of the facts is incorrect: the decision, however cursory, turns on legal propositions that conflict with decisions of this Court and other circuits. It is moreover settled that "appellate courts [do not possess] the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988).

[2] The BIO's statement of facts rests largely on self-serving statements by petitioner's co-defendant, who has admitted that petitioner did *not* give him a weapon (T 1523, 1527) or intend to kill the witnesses (F Ex 93, at 25).

no circuit conflict relating to waiver is presented by this case. Respondent's argument rests on his view that the district court was *per se* forbidden to hold an evidentiary hearing, which the Sixth Circuit properly rejected in accordance with this Court's precedents. See Pet. App. 5a-16a (citing, *inter alia*, *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992); *Townsend* v. *Sain*, 372 U.S. 293 (1963)). Nor was the evidence found by the federal district court cumulative of that before the state courts: twenty-one witnesses – none of whom testified before the jury, and only six of whom testified in the state post-conviction proceedings – testified regarding an array of mitigating factors, see App., *infra*, that respondent has never attempted to rebut.

2. Respondent next mistakenly contends (BIO 7) that the petition asserted a conflict between the decision below and Sixth Circuit precedent. In reality, petitioner's position is that, on either of two independent grounds, other circuits would not have considered the prejudice question without at least providing notice and an opportunity to be heard, given respondent's abandonment of the issue on appeal. First, several circuits have held that states, like habeas petitioners, are deemed to waive arguments abandoned on appeal. See Pet. 9. As Judge Posner has stated, on habeas, "if the state waives its best arguments it must live with the consequences." *Rivera* v. *Director, Dep't of Corrections*, 915 F.2d 280, 283 (CA7 1990). Second, other circuits have held that, even in the non-capital context, habeas petitioners must be given notice and an opportunity to be heard before their claims are *sua sponte* dismissed. See Pet. 10-11. Thus, even if those courts would have addressed whether the federal court record demonstrated prejudice, they would at least have given petitioner's counsel the chance to argue the issue. Respondent's claim that these decisions merely "reflect the exercise of the courts' discretion" (BIO 8) disregards that the courts adopted firm rules based on basic constitutional protections.

3. Respondent's argument (BIO 7) that the Sixth Circuit *implicitly* applied a "miscarriage of justice" exception to the waiver principle is sheer speculation.[3] In any event, this argument only

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[3] The Sixth Circuit majority more likely applied the one-sided waiver approach of the Eighth Circuit. See Pet. 8-9. Not only did the Sixth Circuit find

buttresses the petition's showing of a circuit conflict – because application of that exception would conflict with the firm rule of other circuits just described – and furthermore demonstrates that the panel majority's approach to imposing the death penalty has so defied basic legal principles as to require this Court's intervention. First, respondent's argument that the federal court record "clearly did not support a finding of prejudice" (*id.*) is belied by respondent's actions on appeal: the federal court record so convincingly demonstrated prejudice that respondent declined to appeal on that ground. Second, no "miscarriage of justice" could arise from the district court's order that petitioner be resentenced based on the evidence that constitutionally adequate counsel would have introduced at the original trial. Moreover, the Sixth Circuit *sua sponte* reinstated petitioner's execution – in rulings that respondent notably fails to defend (Pet. 20-21 n.12) – based on the erroneous holding that *petitioner* waived arguments (reliance on the federal court record in challenging the HAC aggravator and the unanimity requirement of the jury instructions). The Sixth Circuit majority and respondent therefore presumably believe that there is no "miscarriage of justice" if petitioner is executed in violation of the Constitution. This Court cannot leave unreviewed such an uneven application of the law when an individual's life hangs in the balance.

4. The decision below also conflicts with this Court's precedents. Although a court may decide an issue *sua sponte* in the non-capital context (*e.g.*, *United States* v. *Karo*, 468 U.S. 705 (1984), *cited in* BIO 8-9), it is settled that a capital defendant is entitled to address the factors that may form the basis for imposing the death penalty. In *Lankford* v. *Idaho*, 500 U.S. 110 (1991), the trial court (like the Sixth Circuit here) imposed a death sentence based on its calculus of aggravating and mitigat-

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waivers by petitioner, but it has never invoked the "miscarriage of justice" exception against a criminal defendant or when a party had abandoned the issue on appeal. Furthermore, the Sixth Circuit apparently has applied the exception without briefing or argument in only two published decisions, neither relevant to the prejudice determination in this case: *Zhislin* v. *Reno*, 195 F.3d 810 (1999) (simply invoking an intervening, controlling decision of this Court); *Dorris* v. *Absher*, 179 F.3d 420, 426 (1999) (emphasizing that the issue was a "pure question of law, with no material facts in dispute").

ing factors not raised by the state and therefore not addressed by the defendant's counsel. This Court overturned the death sentence not because the trial court's conduct "compromised the adversarial process essential to the truth seeking function of a *trial* and, by close analogy, of a *capital sentencing proceeding*" (BIO 9), but because "inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made" (*Lankford*, 500 U.S. at 124). That is precisely what happened in this case, notwithstanding respondent's claim that "obviously" petitioner "was on notice that the court of appeals might well take into account the evidence at the federal evidentiary hearing" because "the district court had relied on that evidence almost exclusively" (BIO 8): respondent consciously abandoned the prejudice argument later adopted by the Sixth Circuit and acquiesced when petitioner's counsel pointed out the abandonment. See Pet. 6; Br. of *Amici* Law Profs. 2-3.

II. Certiorari Should Be Granted To Review The Panel Majority's Prejudice Analysis.

As respondent acknowledges (BIO 9-10), the panel majority reinstated petitioner's death sentence because it concluded that "aspects" of the mitigation proof "also contained harmful information." Pet. App. 20a. As typified by decisions of the Fifth, Eighth, Seventh, and Eleventh Circuits finding prejudice on facts indistinguishable in any material respect (see Pet. 14-17), the panel's decision gives rise to *six* different conflicts with precedents of this Court and other circuits meriting certiorari. (The petition (at 17) mistakenly cites *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (CA8 1983), as a decision of the Fifth Circuit.)[4] Nor can respondent fairly treat these conflicts atomistically, for

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[4] Respondent says only (BIO 10) that the cases discussed in the petition establish no *per se* rule regarding the treatment of supposedly "negative" evidence. The petition did not claim otherwise. Rather, it detailed (at 14-17) why the facts of this case cannot be distinguished from the facts before those four circuits, and furthermore demonstrated that other circuits apply legal propositions which conflict with the decision below (see also *infra* at 5-9).

in combination the district court's finding of prejudice plainly would be sustained under the law of other circuits.

A. The Jurors' View Of Petitioner's Moral Culpability.

Respondent does not dispute that, although the district court found prejudice based on its recognition that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable'" (Pet. App. 87a (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)), the panel majority's contrary holding that petitioner was not prejudiced rests exclusively on its view of how the trial jury might have viewed "the balance of aggravating and mitigating factors" (Pet. App. 20a). The petition argued (at 17-19) that this Court approved of the district court's approach, holding that the proper prejudice inquiry must encompass whether mitigation evidence would "have influenced the jury's appraisal of [the defendant's] moral culpability." *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000). Prejudice thus may exist "even if [the evidence] does not undermine or rebut the prosecution's death-eligibility case." *Id.* See also Supp. Br. Pet'r 1-4.

There indisputably is a circuit conflict meriting certiorari on the proper test for finding prejudice. Respondent argues only (BIO 12) that the court of appeals was right to ignore whether the mitigation proof would have affected the jury's sense of petitioner's moral culpability: "the language in *Williams* seized upon by petitioner pertains only to the reweighing of aggravating and mitigating circumstances by a state court – not the prejudice analysis performed by the court of appeals on collateral review in this case." Respondent thus does not dispute that other circuits on federal habeas *do* find prejudice if the mitigation evidence could have led jurors to believe that the defendant was not sufficiently morally culpable for his crime to be sentenced to death. See Pet. 14-17 (citing *Lockett* v. *Anderson*, 230 F.3d 695, 716 (CA5 2000) ("less morally culpable"); *Emerson* v. *Gramley*, 91 F.3d 898, 907 (CA7 1996) (per Posner, J.) ("reduce[d] * * * moral responsibility"), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Harris* v. *Dugger*, 874 F.2d 756, 764 (CA11) ("less reprehensible"), *cert. denied*, 493 U.S. 1011 (1989)).

This conflict is, moreover, outcome determinative because the six classes of mitigation evidence would have profoundly affected the jurors' sense of petitioner's moral culpability. Respondent *does not contest* that fact here, just as he did not contest it in the court of appeals; even the panel majority did not doubt that it was true. The jurors were not provided with the available, compelling evidence that petitioner had been the victim of shocking abuse, suffered from serious mental illness, and had made substantial contributions to society, or with critical mitigating evidence regarding the prior homicide that constituted the principal aggravator supporting the death penalty. See Pet. 12-14; *e.g.*, Pet. App. 89a (district court opinion recounting how "[p]etitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around his penis" and "struck Petitioner's penis with a baseball bat" (record citations omitted)); see also *Amici* Mental Health & Soc. Worker Orgs. Br. 4-6 & n.2. Both the affidavits of the trial jurors and empirical data definitively confirm that petitioner would not have been sentenced to death if competent counsel had presented this evidence. See *id.* App. 1a-8a; *Amicus* Cornell Death Pen. Proj. Br. 10.[5]

B. The "Totality" of The Mitigation Proof.

Contrary to *Williams* v. *Taylor*, the panel majority did not consider the "totality" of the mitigation evidence. The majority's statement that it found no prejudice "[e]ven considering the supplemental evidence heard by the district court and outlined in

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[5] There also is no support for respondent's contention (BIO 12) that an inquiry into the defendant's "moral culpability" is required in state court but not appropriate on federal habeas. At least in pre-AEDPA cases like this one, this Court has consistently applied the same prejudice analysis under *Strickland* v. *Washington*, 466 U.S. 668 (1984), in cases arising on federal habeas as in cases arising from state courts. *E.g.*, *Glover* v. *United States*, 531 U.S. 198 (2001); *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000); *Smith* v. *Robbins*, 528 U.S. 259 (2000). Given that *Williams* simply explicates the *Strickland* inquiry (see 529 U.S. at 391) – *i.e.*, *Williams* recognizes that jurors consider a defendant's moral culpability in determining whether to sentence him to death – its reasoning applies fully on federal habeas. This point also disposes of respondent's argument (BIO 12) that the Sixth Circuit, unlike a state court, was not required to consider the "totality" of the mitigation evidence.

its opinion" (Pet. App. 20a, *quoted in* BIO 6), reflects only its rejection of respondent's argument that the district court was not permitted to compile an evidentiary record. See Pet. App. 5a-16a. In any event, because the majority opinion does not mention *any* of the mitigation evidence found by the district court (compare *id.* 20a with *id.* 88a-98a), respondent could at best hope to assert that the panel majority *sub rosa* deemed those six classes of mitigation evidence to be wholly unpersuasive. Such a decision conflicts with the extensive authority in other circuits compiled in the petition (see Pet. App. 157a-159a) finding prejudice on far less compelling facts.

C. Erroneous Reliance On The HAC Aggravator.

The petition established that the panel majority erroneously relied on the HAC aggravator. Subsequent to the state court decisions on which respondent relies (BIO 14), the Sixth Circuit held (based on this Court's precedents) that the HAC aggravator is unconstitutionally vague unless the *jury* makes a narrowing finding that the killing involved torture, as opposed to the vaguer "depravity of mind." *Coe* v. *Bell*, 161 F.3d 320, 335-36 (CA6 1998), *cert. denied*, 528 U.S. 842 (1999) (citing *Richmond* v. *Lewis*, 506 U.S. 40 (1992); *Shell* v. *Mississippi*, 498 U.S. 1 (1990) (per curiam); *Maynard* v. *Cartwright*, 486 U.S. 356 (1988)); *Houston* v. *Dutton*, 50 F.3d 381 (CA6), *cert. denied*, 516 U.S. 905 (1995). See also Pet. 21-22 (describing conflict with Tenth Circuit's treatment of HAC aggravator).

The jurors made no such finding in this case, rendering irrelevant respondent's strained contention (BIO 14) that the state appellate courts implicitly employed a limiting construction. The panel majority then relied on the aggravator, invoking "the balance of aggravating and mitigating factors" used in the trial court (Pet. App. 20a), and Judge Batchelder's concurrence *expressly* relied on the "aggravating circumstances *including the heinousness* of the killing" (Pet. App. 38a (emphasis added)).[6]

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[6] The decision below thus also conflicts with the rule that, in a weighing state such as Tennessee, "special emphasis" must be given "to the requirement that aggravating factors be defined with some degree of precision." This Court accordingly has "require[d] close appellate scrutiny of the import and effect of

D. Treatment of So-Called "Harmful" Evidence.

The petition established that the evidence characterized by the panel majority as "harmful" was properly treated as mitigating under *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000), because it would have been presented through expert testimony "consistent with" a portrait of petitioner as less morally responsible for his actions. Petitioner is arguing not for a "per se rule" but that the evidence in this case is on all fours with – indeed, compares favorably to – the evidence in *Williams*. Respondent does not defend the panel majority's critical conclusion (Pet. App. 20a) that the jurors would have been more likely to sentence petitioner to death had they known that the prior homicide underlying imposition of the death penalty was his uncontrollable reaction to being repeatedly raped by a gang led by the victim. See Pet. 13-14, 22. Respondent's attempt to explicate what the panel majority mischaracterized as "a history of violent character traits" (Pet. App. 20a) fares no better: this evidence – describing a few minor incidents (none of which resulted in serious injury) more than *a decade* before the homicide at issue in this case, and the fact that petitioner went AWOL from the military – does not undermine the mitigation proof that the district court found would have been compelling to the jurors. See generally *Amicus* Cornell Death Pen. Proj. Br.[7]

E. Failure to Account for the Views of a Single Juror.

In *Williams* v. *Taylor*, this Court agreed to resolve, but ultimately did not reach, whether a less stringent standard for prov-

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aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer* v. *Black*, 503 U.S. 222, 230 (1992).

[7] Furthermore, this evidence was inadmissible under the holding of *Carter* v. *Bell*, 218 F.2d 581, 589 (CA6 2000), that the state may introduce only evidence relevant to a particular aggravating or mitigating circumstance. Decisions that pre-date *Carter* and, in any event, never expressly disagreed with *Carter*'s holding are therefore irrelevant. None of the evidence cited by respondent would have proved any of the three aggravators invoked by the state or rebutted petitioner's case in mitigation. And although respondent asserts (*id.*) that the evidence was not "cumulative," Judge Cole's dissent properly explained that the jurors already had heard much of it (Pet. App. 45a).

ing prejudice applies when (as in Tennessee) a single juror could have held out for a life sentence. The district court embraced the relaxed single-juror standard applied by most circuits that have addressed the question. See Pet. 24-25; Pet. App. 96a. Respondent does not deny that the issue merits certiorari, but asserts (BIO 16-17) that it is not presented here because the Sixth Circuit neither "adopted [n]or rejected petitioner's argument." But as the petition explained, the panel majority agreed that the "supplemental evidence contains mitigating evidence that *a sentencer* might find to be compelling," and found no prejudice based only on its view of the effect of the evidence on "the sentencing jury." Pet. App. 20a, 19a. Even if the panel's opinion only ignored – rather than rejected – the proposition that the single-juror standard was appropriate, certiorari would still be warranted because the Sixth Circuit's failure to apply the single-juror standard conflicts with the settled law of other circuits.

F. The Absence of Mitigating Evidence at Trial.

Respondent does not dispute that when trial counsel fails to present mitigating evidence, prejudice is exceedingly likely to be found because jurors were provided with no reason to spare the defendant's life. See Pet. 25-26. Respondent maintains only (BIO 17) that there was mitigation evidence in this case. But the meager plea of petitioner and his wife for his life was neither a "strategy" (as respondent does not dispute that petitioner's counsel was constitutionally ineffective) nor involved the presentation of any mitigating "evidence." The district court correctly found that the specific testimony invoked by respondent was "breathtakingly brief in content, and lacking in quality, and quantity" (Pet. App. 94) and that (as the Sixth Circuit majority emphasized and invoked against petitioner) "'[t]his is a case of *no mitigating evidence—none*—being offered to the jury despite its availability and abundance'" (*id.* 24a (emphasis added)). Because a heightened prejudice inquiry would have been applied under the settled law of other circuits, certiorari is warranted.

III. Certiorari Should Be Granted On The Unanimity Issue.

Respondent only emphasizes the conflict between the decision below and the holding of *Kubat* v. *Thieret*, 867 F.2d 351 (CA7), *cert. denied*, 493 U.S. 874 (1989), that jury instructions

may not suggest that jurors must be unanimous in their weighing of aggravating and mitigating circumstances. See BIO 12 (emphasizing that Sixth Circuit required unanimity in weighing). Such an instruction, the Seventh Circuit held, creates the risk that if "one juror thought that the death penalty should not be imposed, he or she might have submitted to the views of the other eleven because of the mistaken belief that unanimity was required" as to the balance of aggravating and mitigating circumstances. 867 F.2d at 371. Under Seventh Circuit precedent, petitioner's death sentence would thus have been invalidated.[8]

This case also squarely presents the distinct circuit conflict over whether jury instructions and forms announcing the unanimity requirement in close proximity to the discussion of mitigating circumstances impermissibly suggest that jurors must be unanimous as to each mitigator. See Pet. 26-30. Respondent notes (BIO 21) that the instructions in *Frey* v. *Fulcomer*, 132 F.3d 916 (CA3 1997), *cert. denied*, 524 U.S. 911 (1998), "suggest[ed] the need for juror unanimity," but ignores that the same was true in this case, leading Tennessee later to amend its pattern instructions. Of particular note, respondent ignores entirely that the "Punishment of Death" verdict form required the jurors to certify that "[w]e, the jury, *unanimously find* that there are *no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above." Pet. App. 161a (emphasis added). It is difficult to imagine a more explicit requirement of unanimity.

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[8] The excerpt of the *Kubat* instruction invoked by respondent suggests not that jurors must find a mitigating circumstance unanimously but rather that – like the instruction in this case – jurors must be unanimous as to the weighing of mitigating and aggravating circumstances. BIO 21 (quoting instruction directing jurors to select non-capital sentence if "you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 5, 2001.

APPENDIX

Mitigation Witnesses In Order Of Appearance

A. Petitioner's Witnesses

1. T 10-81 - Dr. Kris Sperry, Chief Medical Examiner of the State of Georgia, who upon evaluation of blood lab evidence, crime scene photographs, and the victim's autopsy report, concluded that petitioner did not have blood on his clothes from the crime scene and, therefore, given the total circumstances, could not have been the assailant.

2. T 179-268 - Neal McAlpin, petitioner's trial counsel, who testified to the influence that the Southeastern Gospel Ministry ("SEGM") had over petitioner and the involvement that it had in the commission of the offense, as well as to petitioner's good character traits.

3. T 271-432 - Lionel Barrett, petitioner's trial counsel, who admitted to his failure to investigate or present any mitigating evidence and to calling to testify two unprepared witnesses, who offered no substantive mitigating evidence.

4. T 439-600 - Dr. Robert Sadoff, nationally renowned psychiatrist, who diagnosed petitioner with borderline personality disorder and post-traumatic stress disorder, and concluded that, given his psychological history, vulnerability, and all known evidence, he dissociated at the time of the offense and was, therefore, legally insane under Tennessee law, and had no independent recollection of the actual assault, whether or not he was the assailant.

5. T 613-663 - Dr. Diana McCoy, neuropsychologist and petitioner's social historian, who summarized the history of abuse, neglect, deprivation, and mental illness that petitioner endured, *see* Social History Ex. 141, and who also agreed with Dr. Sadoff's diagnosis.

6. T 689-769 - Sumter Camp, attorney who assisted Barrett at trial and who testified consistent with Barrett concerning their failures to investigate or present mitigating evidence.

7. T 786-842 - Nancy Lancaster, petitioner's half-sister, who testified about petitioner's childhood and that of his siblings, including a history of the most extreme abuse, neglect, and deprivation inflicted by their parents.

8. T 858-894 - Richard Dinkins, post-conviction counsel, who testified concerning the state post-conviction trial court's bias and its refusal to provide resources necessary to retain essential investigative and expert resources or to secure the appearance of witnesses in order to demonstrate the abundant unpresented mitigation proof that had been available for presentation at trial.

9. T 899-1022 - John Zimmermann, Assistant District Attorney and petitioner's trial prosecutor, who acknowledged the existence at the time of trial in his possession of documentary evidence of specific mitigation evidence on behalf of petitioner, which he did not reveal to petitioner or his trial counsel.

10. T 1025-1053 - Ross Alderman, counsel for co-defendant Devalle Miller, who testified to evidence that was exculpatory and mitigating to petitioner with regard to his culpability and involvement in the commission of the offense.

11. T 1054-1156 - Bryan Stevenson, nationally renowned, experienced, and exceptionally qualified capital defense attorney expert, who testified in federal court about the extreme nature of trial counsel's failures and the proof that "is some of the strongest mitigation that I have seen," T 1123.

12. T 1181-1213 - Sarah Walton Roberts, petitioner's former fiancée, Quaker, attorney, and then-current employee of the Maine Attorney General's office, who testified regarding petitioner's good character, altruistic motives, good works, and the mitigating nature of his personal and intimate relationship with her.

13. T 1215-1267 - Susie Bynum Jones, petitioner's wife, who testified concerning petitioner's good character, the influence on petitioner of the SEGM, and petitioner's mental state mitigation evidence.

14. T 1275-1294 - Gail Hughes Mann, petitioner's friend, who testified as to her positive relationship with him.

15. T 1307-1342 - Dr. Ray Winbush, psychologist, Director of the Race Relations Institute and Professor at Fisk University, who testified as to the extreme nature of the abuse and neglect endured by petitioner – *e.g.*, "It is singularly the worst case of abuse I have come across in 25 years," T 1315.

16. Evidentiary deposition, Ex. 135 - Elmer Bishop, a correctional supervisor at the federal reformatory where petitioner was in custody in 1972, who confirmed the exculpatory, mitigating version of the 1972 aggravating homicide as a defensive act by petitioner to prevent his homosexual rape, as opposed to the erroneous account put forth by the prosecution in the state trial that it was a killing committed during the course of a drug turf war between competing prison gangs. In fact, Elmer Bishop described petitioner as a victim of "sexual predators."

17. Evidentiary deposition, Ex. 136 - FBI Special Agent, William Delagrange, who investigated the 1972 offense and corroborated the mitigating account of the 1972 offense, consistent with Officer Elmer Bishop's version.

18. Evidentiary deposition, Ex. 148 - Allen Boyd, petitioner's employer at the Baptist Publishing Board (BPB), petitioner's mentor at the SEGM, an accomplice before and after the commission of the instant offense, and source of the attorney's fee for petitioner's trial attorney, who, by refusing to answer questions on the ground that it might incriminate him, supported petitioner's account of the exculpatory and mitigating influence of the SEGM in the commission of the offense.

19. Evidentiary deposition, Ex. 149 - William Beard, another principal of SEGM, whose role as accomplice and mentor was established through other sources, such as petitioner's initial counsel, Neal McAlpin, and who also refused to answer questions on the basis of the Fifth Amendment.

20. Evidentiary deposition, Ex. 152 - Richard Bretzlauf, petitioner's employer in Chicago immediately before his move to Nashville, as to mitigating evidence of petitioner's good character and industry.

B. Respondent's witnesses:

1. T 439-613 - Dr. Samuel Craddock, a psychologist from Middle Tennessee Mental Health Institute (MTMHI), who performed the court-ordered evaluation at trial (but did not testify at trial) and who did not dispute the diagnosis of petitioner found by Dr. Robert Sadoff and Dr. Diana McCoy.

Supreme Court, U.S.
FILED
AUG 10 2001
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(8)

CAPITAL CASE - NO DATE OF EXECUTION SET
No. 00-1742

DISTRIBUTED
AUG 21 2001

In the
Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

Petitioner's Opposition To Respondent's Motion To Strike

Petitioner Abu-Ali Abdur'Rahman respectfully submits this opposition to the Motion of respondent Ricky Bell to strike portions of the brief of *amici curiae* National Mental Health Association *et al.* in support of the petition for a writ of certiorari ("NMHA Brief").

1. An appendix to the NMHA Brief reproduces sworn affidavits of a majority of the jurors who voted to sentence petitioner to death. The Brief maintains (at 11) that the affidavits support the petition because they contradict the Sixth Circuit's *sua sponte* determination in this case that petitioner was not prejudiced by the constitutionally defective assistance of his counsel in failing to introduce mitigating evidence:

6 pp

> [The jurors] each expressed dismay at not having been informed of, *inter alia*, Petitioner's history of mental illness and hospitalizations, childhood abuse, attempted suicides, and homosexual threats against him in prison. Most of the jurors stated that had they known these facts about Petitioner's background they probably would have voted for a life sentence.

Respondent has moved to strike the affidavits, as well as that portion of NMHA's argument that rests on the affidavits, on two grounds: (i) the affidavits are not part of the record; and (ii) the affidavits are inadmissible under Fed. R. Evid. 606(b).

2. Respondent's Motion is flawed in three distinct respects and accordingly should be denied.

a. First, this case is pending only at the certiorari stage, not on the merits. NMHA invokes the juror affidavits merely to highlight that certiorari should be granted in this capital case because of the considerable doubts surrounding the panel majority's essentially unexplained holding that the unintroduced mitigation evidence would not have affected the jurors at sentencing. Contrary to the premises of respondent's Motion, therefore, the Court is not being called upon to "'affirm or reverse,'" determine the "'lawfulness of the conviction,'" or decide "'the validity of a verdict'" at this preliminary stage of the case. Motion at 2 (quoting *Russell* v. *Southard*, 53 U.S. (12 How.) 139, 159 (1851); *Hopt* v. *Utah*, 114 U.S. 488, 491-92 (1885); Fed. R. Evid. 606(b)). Petitioner has consulted with *amicus* NMHA, which has confirmed that it does not intend to reproduce or

rely upon the affidavits if certiorari is granted.[1]

b. Second, Respondent's specific reliance on Fed. R. Evid. 606(b) is erroneous. The Federal Rules of Evidence do not apply in this Court. See Fed. R. Evid. 101, 1101 (rules apply in bankruptcy courts, district courts, and courts of appeals). Compare S. Ct. R. 17.2 (providing that Federal Rules of Evidence may be used for guidance in *original* actions).

Moreover, Rule 606(b) is on its face inapposite. As noted, this stage of the proceedings does not involve "an inquiry into the validity of a verdict or indictment," but rather an inquiry into whether this case merits certiorari.[2] Additionally, because the affidavits state what effect additional evidence would have had upon the jurors, they do not reflect the jurors' testimony:

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[1] It is furthermore entirely understandable that the affidavits were not collected and introduced below. A substantial question arose regarding whether petitioner was prejudiced by the ineffective assistance of his counsel only *after* the court of appeals *sua sponte* reinstated petitioner's death sentence notwithstanding the extensive record compiled before the district court.

[2] Even if the affidavits were regarded as going to the merits of petitioner's case at this stage, invoking Rule 606(b) to strike the affidavits would give rise to a substantial constitutional question that ought to be avoided. If applicable, Rule 606(b) would present a *per se* prohibition on the use of compelling evidence to demonstrate that petitioner was unconstitutionally sentenced. There is no dispute in this case that petitioner received constitutionally ineffective assistance of counsel; the only remaining issue is whether that constitutional error was harmless. To prohibit petitioner from introducing compelling evidence that he was prejudiced without any showing (indeed, without any suggestion) that the evidence is somehow unreliable would raise a substantial due process concern.

> as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith . . . .

Fed. R. Evid. 606(b).

c. In any event, the remedy for respondent's objections would not be to strike portions of the NMHA brief. Neither the rules of this Court nor Rule 606(b) mandate that juror affidavits be excised from the case file, as opposed to simply ignored. The only effect of ordering that these materials be stricken would be to require a group of public interest mental health organizations to incur the not-insubstantial cost of reprinting their brief.

Ignoring, rather than striking, inappropriate materials appears to be the Court's regular practice. *Amici* constantly present extra-record materials and materials that do not comply with the Federal Rules of Evidence. Those submissions are not ordered stricken, however. The process of policing *amicus* submissions, and passing upon motions such as this one, would create an unnecessary additional administrative burden on the Court and potentially deter valuable submissions.

The Court of course thus regularly denies motions to strike all or a portion of an amicus brief.[3] Indeed, Petitioner has

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[3] *See, e.g., Thompson* v. *Calderon*, 520 U.S. 1259 (1997); *California Dep't of Corrs.* v. *Morales*, 513 U.S. 1074 (1995); *International Soc'y for Krishna Consciousness* v. *Lee*, 503 U.S. 933 (1992); *United States* v. *Mabus*, 502 U.S. 904 (1991); *Gilmer*

been unable to identify even a single case in which this Court has *ever* granted a motion to strike a portion of an amicus brief.[4]

No doubt, a motion to strike an *amicus* submission may be appropriate in extraordinary circumstances not present here. Only two sentences of the NMHA Brief are in question. There is no doubt as to the authenticity or veracity of the affidavits. And, if anything, the affidavits are simply more specific support for a proposition that *amici* are well-suited to present to this Court: that evidence of the sort that should have been presented in this case does affect jurors' determination whether to impose the death penalty.

Conclusion

For the foregoing reasons, the Motion of respondent Ricky Bell to strike portions of the brief of *amici curiae* National

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v. *Interstate/Johnson Lane Corp.*, 498 U.S. 1011 (1990); *Davis* v. *Bandemer*, 470 U.S. 1083 (1985); *Massachusetts* v. *Sheppard*, 464 U.S. 1034 (1984); *Oliphant_v. Suquamish Indian Tribe*, 431 U.S. 964 (1977); *Costello* v. *Wainwright*, 430 U.S. 325 (1977); *Antoine* v. *Washington*, 419 U.S. 1043 (1974); *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 815 (1974); *California Dep't of Human Resources Devel.* v. *Java*, 401 U.S. 932 (1971); *Murfreesboro* v. *Rutherford County*, 361 U.S. 919 (1969); *Harman* v. *Forssenius*, 379 U.S. 987 (1965); *United States* v. *Mississippi*, 379 U.S. 952 (1965); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 861 (1958)(all denying such motions).

[4]In fact, petitioner has been able to identify only a single, extraordinary instance in which a motion to strike even an amicus brief in its entirety was granted. *See Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 503 U.S. 1002 (1992).

Mental Health Association *et al.* in support of the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 10, 2001

No. 00-1742 (9)

IN THE SUPREME COURT OF THE UNITED STATES

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO STRIKE PORTIONS OF BRIEF *AMICI CURIAE* OF NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE, NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER, AND TENNESSEE VOICES FOR CHILDREN, INC.

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SUPREME COURT, U.S.

App

Respondent respectfully moves the Court for an order striking from the Brief *Amici Curiae* of National Mental Health Association, et al., the appendix (pages 1a—8a) and the second full paragraph on page 11 of the brief. The appendix consists of the affidavits of eight jurors, impeaching their sentencing verdict at petitioner's 1987 trial. The second full paragraph on page 11 of the brief consists of argument based on the affidavits.

The affidavits are not part of the certified record in this case. Therefore, the affidavits and the argument based on them are not properly before this Court. *See Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851)("This court must affirm or reverse upon the case as it appears in the record"); *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885)("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by *ex parte* affidavits . . .").

Furthermore, Fed.R.Evid. 606(b)[1] prohibits such affidavits from being received

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[1]Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

for the purpose of demonstrating "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. . . ." This rule prohibits juror testimony about whether the sentence would have been different had the jury heard mitigating evidence that was allegedly available but not presented at trial. *Williams v. Collins*, 16 F.3d 626, 636 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). *See* 27 C. Wright & V. Gold, *Federal Practice and Procedure* § 6074, p. 416 (Supp. 2001)("The rule also prohibits jurors from testifying as to how evidence that was not received might have influenced their verdict").

For the reasons stated, the Court should enter an order striking the above-designated portions of the brief.

Respectfully submitted,

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MICHAEL E. MOORE
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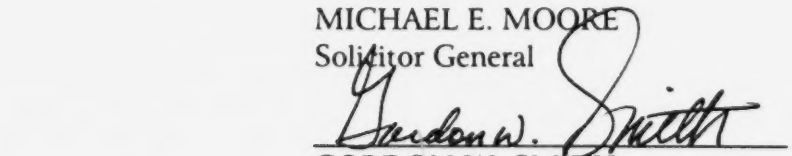

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CERTIFICATE OF SERVICE

I, Gordon W. Smith, a member of the Bar of this Court, hereby certify that on the 19th day of July, 2001, one copy of this motion was mailed, first-class, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

Gordon W. Smith

GORDON W. SMITH
Associate Solicitor General